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# Antitrust and Communications Policy: There's an App for Just About Anything, Except Google Voice

Jason W. Croft\*

## *Author's Note:*

*As this article goes to press, Apple has just announced that it had accepted the Google Voice application to the App Store, which is a small step in the right direction. Although this article centered around Apple's alleged denial of the Google Voice application, this article used the alleged denial as a case study to address broader issues of technology and business policies. In particular, in light of the recent class action certification in federal court of In re Apple & AT&T Antitrust Litig., No. C 07-05152, 2010 WL 3521965 (N.D.C.A. July 8, 2010), this article is timely because it provides an analysis of Apple and AT&T's business practices and how they intersect with U.S. antitrust and communications law. This article also analyzes these broad issues through the lens of net neutrality.*

## I. INTRODUCTION

There's an app for just about everything<sup>1</sup>—but not Google Voice.

The world has changed considerably since the Federal Communications Commission<sup>2</sup> (FCC) allocated spectrum to mobile telephony in 1968.<sup>3</sup> In

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- \* SSRN author page <http://ssrn.com/author=1479355>. This Article was the culmination of multiple courses in antitrust, communications and intellectual property law overseen by Professors Catherine J. K. Sandoval and Allen S. Hammond IV while the author was a student at Santa Clara University School of Law. The author is grateful to Professors Sandoval and Hammond for their invaluable guidance in the preparation and refinement of this Article. Special thanks to QuynhChi P. Nguyen for her comments on this Article.
1. Apple iPhone Gallery - TV Ads, <http://www.apple.com/iphone/gallery/ads/#avid-large> (last visited Nov. 3, 2010); See Apple - iPhone, Over 250,000 ways to make iPhone even better, <http://www.apple.com/iphone/apps-for-iphone/> (last visited Nov. 3, 2010).
  2. The Federal Communications Commission [hereinafter FCC] is an independent government agency in the United States. It was established by the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, which grants the Commission power to regulate interstate and international radio, television, wire, wireless, satellite and cable communications. FCC, About the Federal Communications Commission, <http://www.fcc.gov/aboutus.html> (last visited Nov. 3, 2010).
  3. See An Inquiry Relative to the Future Use of the Frequency band 806-960 MHz; and Amendment of Parts 2, 18, 21, 73, 74, 89, 91 and 93 of the Rules Relative to Operations in the Land Mobile Service Between 806 and 960 MHz, Notice of Inquiry and Notice of Proposed Rule Making, Docket No. 18262, 14 F.C.C.2d 311 (F.C.C. 1968).

1981, the FCC authorized the first commercial cellular networks.<sup>4</sup> Today, there are more than 200 million mobile telephone subscribers nationwide.<sup>5</sup> In recent years, the number of wireless phone subscribers has surpassed the number of traditional wireline subscribers by more than 100 million individuals.<sup>6</sup> For many Americans, a mobile phone has become as necessary as a wallet or a set of keys.<sup>7</sup> Consumers are now using their mobile phones for more than making telephone calls. They rely on numerous applications to perform tasks such as finding the closest Mongolian barbecue restaurant,<sup>8</sup> tracking a golf game using global positioning (GPS),<sup>9</sup> or learning what song is playing on the radio.<sup>10</sup>

As a result, the demand for aftermarket mobile phone applications has exploded.<sup>11</sup> For example, Apple Inc. sells a mobile phone called the iPhone which allows users to install aftermarket applications from Apple's online marketplace called the App Store.<sup>12</sup> Since its opening,<sup>13</sup> the Apple App Store

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4. See An Inquiry Into the Use of Bands 825-845 MHz and 870-890 MHz for Cellular Commc'ns Sys.; and Amendment of Parts 2 and 22 of the Comm'n's Rules Relative to Cellular, Report and Order, CC Docket No. 79-318, FCC 81-161, Commc'ns Sys., 86 F.C.C.2d 469 (F.C.C. 1981).
  5. *Annual Report & Analysis of Competitive Market Conditions With Respect to Commercial Mobile Servs.*, Eleventh Report, WT Docket No. 06-17, FCC 06-142, at 96 (rel. Sep. 29, 2006) (Table 1 shows CTIA's estimate of nationwide wireless subscribers).
  6. *Local Tel. Competition: Status as of June 30, 2008*, at 2 (July 2009), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-292193A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-292193A1.pdf) (listing number of wireline and wireless telephone subscribers as of June 30, 2008 as 154.7 million and 255.3 million, respectively).
  7. Petition to Confirm A Consumer's Right to Use Internet Communications Software and Attach Devices to Wireless Networks, RM-11361, filed Feb. 20, 2007 at 4 (citations omitted).
  8. Frank Bruni, *Where to Eat? Ask Your iPhone*, N.Y. TIMES, July 16, 2008, available at <http://www.nytimes.com/2008/07/16/dining/16note.html> (last visited Nov. 3, 2010) (describing an application called Urban Spoon).
  9. iPhone Golf GPS Rangefinder, available at <http://www.airvugolf.com> (last visited Nov. 3, 2010).
  10. Shazam on iPhone, available at <http://www.shazam.com/music/web/pages/iphone.html> (last visited Nov. 3, 2010).
  11. See Yukari Iwatani Kane & Ryan Knutson, *iPhone Apps Take Root as Cottage Industry*, WALL ST. J., Nov. 12, 2009, available at <http://online.wsj.com/article/SB125796886127143907.html> (last visited on Nov. 3, 2010).
  12. Apple iPhone - Download Games and Applications for iPhone, Learn about apps available on the App Store, available at <http://www.apple.com/iphone/apps-for-iphone/#heroOverview> (last visited Nov. 3, 2010).
  13. Press Release, Apple Inc., iPhone 3G on Sale Tomorrow, Over 500 Native Applications for iPhone & iPod touch Available at Launch (July 10, 2008)

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boasts over 250,000 iPhone applications,<sup>14</sup> and reports over 1.5 billion application downloads to date.<sup>15</sup> Apple receives about 8,500 new applications each week,<sup>16</sup> and approves around 80% of the applications as submitted.<sup>17</sup> Apple approves 95% of applications within 14 days of their submission.<sup>18</sup>

On June 2, 2009, Google submitted a new application called Google Voice to Apple for inclusion in the App Store.<sup>19</sup> In its response to the FCC inquiry, Google stated:

Google Voice is an enhanced voice and data messaging application that provides number management<sup>20</sup> and related services to users who have one or more existing wireline or mobile phone services. The proposed Google Voice for iPhone is a software application designed to allow Google Voice users to utilize their iPhone to manage their phone numbers and voicemail, integrate contacts, place outbound calls, and send SMS messages from their Google Voice phone number.<sup>21</sup>

Google claims that Apple wrongfully rejected the application on July 7, 2009, during a telephone conversation between Apple's Senior Vice Presi-

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*available at* <http://www.apple.com/pr/library/2008/07/10iphone.html> (last visited Dec. 9, 2009).

14. Apple iPhone Gallery - Apps for iPhone, *available at* <http://www.apple.com/iphone/gallery/#gallery01> (last visited Nov. 3, 2010) (stating "over 250,000 ways to make the iPhone even better.").
15. Letter from Catherine A. Novelli, Vice President Worldwide Gov't Affairs, Apple Inc., to Ruth Milkman, Chief, Wireless Telecomms. Bureau, Fed. Commc'ns Comm'n, Proceeding RM-11361 at 1 (filed Aug. 21, 2009) [hereinafter Apple Resp.] *available at* [http://wireless.fcc.gov/releases/8212009\\_Apple\\_Response.pdf](http://wireless.fcc.gov/releases/8212009_Apple_Response.pdf).
16. *Id.* at 6.
17. *Id.*
18. *Id.* at 2.
19. Letter from Richard S. Whitt, Esq., Washington Telecom and Media Counsel, Google, Inc., to James. D. Schlichting, Senior Deputy Bureau Chief, Wireless Telecomm. Bureau, Fed. Commc'ns Proceeding RM-11361 at 3-4 (filed Aug. 21, 2009) [hereinafter Google Resp.] *available at* <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020037203>.
20. When signing up for Google Voice, customers begin by choosing a new phone number. Users can configure their contacts list so that when someone dials this number, the call routes to a physical phone, such as a mobile phone or a home phone. Users can also configure call routing based on the time of day. For example, calls between 8:00 am and 6:00 pm could be directed to a work phone and calls outside of those times could be routed to a different phone. *See* <http://www.google.com/googlevoice/about.html> (last visited Nov. 3, 2010).
21. *Id.*

dent of Worldwide Product Marketing and Google's Senior Vice President of Engineering and Research.<sup>22</sup>

Apple's alleged denial of the Google Voice application raises the question of whether Apple is engaging in anticompetitive conduct in violation of the antitrust laws or the Communications Act of 1934 (hereinafter "Communications Act"), as amended. While the Department of Justice and the Federal Trade Commission are the primary enforcers of the antitrust laws,<sup>23</sup> antitrust laws may also guide the FCC's inquiry into whether conduct violates the Communications Act, or merits rulemaking under the FCC's aegis. During the inquiry process, the FCC may look for guidance from the antitrust laws because "antitrust concerns are important components of the public interest and [the FCC is] entitled, if not obliged, to consider them."<sup>24</sup> In some instances, the FCC may rely solely on antitrust laws in making and enforcing its decisions under the Communications Act.<sup>25</sup> Under U.S. law, the FCC has jurisdiction over the communications industry and should act to further the public interest, convenience and necessity.<sup>26</sup> The public-interest standard grants the FCC a wider brush than the antitrust laws. The FCC can consider not only whether behavior is anticompetitive and weigh its justifications, but can also consider whether conduct is in the "public interest."<sup>27</sup>

On July 31, 2009, the FCC initiated an investigation regarding Apple's handling of the proposed Google Voice application.<sup>28</sup> The FCC mailed let-

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22. Google Resp., *supra* note 19, at 3-4.
  23. Antitrust Division Manual, Antitrust Division Relationships with Other Agencies and the Public, Fourth Edition, Page VII-4, (updated July 2009), *available at* <http://www.justice.gov/atr/public/divisionmanual/atrdivman.pdf> (last visited Nov. 3, 2010).
  24. In the Matter of Amendment of Sections 73.34, 73.240, and 73.636 Of The Commission's Rules Relating To Multiple Ownership Of Standard, FM, And Television Broadcast Stations, Doc. No. 18110, 50 F.C.C.2d 1046, 1117-18 (Jan. 31, 1975) (responding to contentions that the FCC is only to enforce the Communications Act and not the antitrust laws); *See Nat'l Broad. Co. v. United States*, 319 U.S. 190, 222-24 (1943); *see generally*, Robert W. Bennett, *Media Concentration and the FCC: Focusing With a Section Seven Lens*, 66 Nw. U.L. REV. 159, 165 (1971).
  25. *United States v. RCA, Radio Corp. of Am.*, 358 U.S. 334, 351 (1954) ("the Commission might find that antitrust considerations alone would keep the statutory standard [of the Communications Act of 1934] from being met"); *See id.* at 354 *citing* 98 Cong. Rec. 7399; *see also* *Mansfield Journal Co. v. Fed. Commc'ns Comm'n*, 180 F.2d 28, 33-34 (1950).
  26. 47 U.S.C. § 154.
  27. *See In The Matter Of Rules and Policies On Foreign Participation In The U.S. Telecomm. Market Commc'ns Satellite Corp.*, 13 F.C.C.R. 6219 (F.C.C. 1998).
  28. FCC Proceeding Number RM-11361, *available at* <http://fjallfoss.fcc.gov/ecfs2/proceeding/view?z=tykm4&name=RM-11361> (last visited Nov. 3, 2010).

ters to Apple,<sup>29</sup> AT&T<sup>30</sup> and Google.<sup>31</sup> In these letters, the FCC questioned each party's involvement with the Google Voice application. In its response to the FCC letter, Google alleged that Apple denied the Google Voice application, and will not allow users to purchase it in the Apple App Store.<sup>32</sup> Apple contends that the application duplicates existing features found on Apple's popular iPhone.<sup>33</sup> In essence, Apple's position is that Google Voice is redundant and unnecessary for iPhone users.<sup>34</sup> Apple also claims that it did not deny the Google Voice application, and that it is currently pending review.<sup>35</sup>

This Article will analyze the FCC's investigation and develop an analytical framework to guide the FCC's ruling. Various theories of anticompetitive behavior will be analyzed under the Sherman Act,<sup>36</sup> the Communications Act,<sup>37</sup> and the Telecommunications Act of 1996.<sup>38</sup> Potential theories of liability include abuse of market/monopoly power,<sup>39</sup> whether Apple has a duty to deal with its competitors,<sup>40</sup> whether Apple and AT&T are engaged in an

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29. Letter from James D. Schlichting, Acting Chief, Wireless Telecomms. Bureau, Fed. Comm'n's Comm'n, to Catherine A. Novelli, Vice President, Worldwide Gov't Affairs, Apple Inc., Letter to Apple regarding Google Voice and related iPhone applications, WTB Orders (DA 09-1736) (Jul. 31, 2009) *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-09-1736A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-1736A1.pdf) (last visited Nov. 3, 2010).
  30. Letter from James D. Schlichting, Acting Chief, Wireless Telecomms. Bureau, Fed. Comm'n's Comm'n, to James W. Cicconi, Senior Executive Vice President-External and Legislative Affairs, AT&T Services, Inc., Letter to AT&T concerning Apple's rejection of the Google Voice for iPhone Application, WTB Orders (DA 09-1737) (Jul. 31, 2009) *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-09-1737A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-1737A1.pdf) (last visited Nov. 3, 2010).
  31. Letter from James D. Schlichting, Acting Chief, Wireless Telecomms. Bureau, Fed. Comm'n's Comm'n, to Richard S. Whitt, Esq. Washington Telecom and Media Counsel, Google Inc., Letter to Google concerning Apple's rejection of the Google Voice for iPhone Application, WTB Orders (DA 09-1739) (Jul. 31, 2009) *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-09-1739A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-1739A1.pdf) (Last visited Nov. 3, 2010).
  32. Google Resp., *supra* note 19, at 1.
  33. Apple Resp., *supra* note 15, at 2.
  34. *Id.*
  35. *Id.*
  36. 15 U.S.C. §§ 1–7 (2009).
  37. 47 U.S.C. §§ 151 *et seq.* (2009).
  38. Telecomm. Act of 1996, Pub. LA. No.PL 104–104, 110 Stat. 56 (1996).
  39. *See infra* Part V.A.
  40. *See infra* Part V.B.

anticompetitive conspiracy,<sup>41</sup> foreclosure,<sup>42</sup> and illegal tying.<sup>43</sup> This article will also analyze the parties' conduct under FCC precedent and policies. Since most of these theories begin with defining the relevant market, this Article will preface its analysis of legal theories with a relevant market.<sup>44</sup> Similarly, this Article will also discuss whether Apple has market power<sup>45</sup> or monopoly power,<sup>46</sup> both of which will be used in liability theory analyses. While the FCC and the Federal Trade Commission (FTC) have concurrent jurisdiction,<sup>47</sup> the FTC has not initiated enforcement proceedings. Should the FTC decide to pursue enforcement of the antitrust laws on this issue, this Article will provide guidance during those proceedings.

## II. MARKET DEFINITION

Analyzing most anticompetitive behavior begins by defining the relevant market.<sup>48</sup> An accurately defined relevant market includes a seller's product and all competing products.<sup>49</sup> Two elements combine to form a relevant market: (1) a product market and (2) a geographic market.<sup>50</sup>

Defining an accurate relevant market is critical when analyzing anticompetitive behavior. An inaccurate relevant market definition creates an imperfect subsequent analysis. Statisticians and Information Technology professionals refer to the problem of using a bad market definition with the phrase: "garbage in, garbage out."<sup>51</sup> Under this theory, any analysis and conclusion founded on incorrect or incomplete input data can never be accurate or reliable.

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41. See *infra* Part V.C.

42. See *infra* Part V.D.

43. See *infra* Part V.E.

44. See *infra* Part II.

45. See *infra* Part III.

46. See *infra* Part IV.

47. *United States v. Radio Corp. of Am.*, 358 U.S. 334, 350 n.18 (1959) (The FCC enforces the Communications Act and the FTC and Department of Justice enforce the Sherman Act and the Federal Trade Commission Act); see Catherine J. K. Sandoval, *Disclosure, Deception, And Deep-Packet Inspection: The Role Of The Federal Trade Commission Act's Deceptive Conduct Prohibitions In The Net Neutrality Debate*, 78 *FORDHAM L. REV.* 641, 660 (2009).

48. Horizontal Merger Guidelines, U.S. Dep't of Justice & the Fed. Trade Comm'n, issued April 2, 1992, § 1 August 19, 2010, § 4.0, revised April 8, 1997 [hereinafter Horizontal Merger Guidelines] available at <http://www.justice.gov/atr/public/guidelines/hmg.pdf> (last visited Nov. 3, 2010).

49. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956).

50. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993); *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1024 (10th Cir. 2002).

51. CHRISTINE B. TAYNTOR, *SIX SIGMA SOFTWARE DEVELOPMENT* 139 (2003).

Applying the “garbage in, garbage out” theory to antitrust analysis, decisions based on an unduly narrowly defined relevant market run the risk of excluding the effects of competing products.<sup>52</sup> A relevant market that is too narrow will exclude genuine substitutes, and overstate the defendant’s ability to affect the price and output.<sup>53</sup> Likewise, decisions based on a broad, all-encompassing relevant market “might miss harms to competition that are masked by the improper inclusion of non-competitors.”<sup>54</sup> A market defined too broadly to include non-substitutes results in an understatement of a defendant’s market power because some of the included products will not actually possess the power to influence the market.

## A. Product Market

### 1. DOJ and FTC Guidelines

The Department of Justice and the FTC have issued joint guidelines for defining the relevant product market.<sup>55</sup> Under these guidelines, demand substitution factors are used to define the relevant product market.<sup>56</sup> Products or groups of products are included in a relevant product market if “a hypothetical profit-maximizing firm that was the only present and future seller of those products (‘hypothetical monopolist’) likely would impose at least a small but significant and nontransitory increase in price . . . .”<sup>57</sup> The price increase usually amounts to at least five percent and lasts for the foreseeable future.<sup>58</sup>

Beginning with the defendant’s product, the investigating agency will ask whether the monopolist would obtain a profit by imposing a price increase.<sup>59</sup> The agency will use a variety of factors to determine the likely consumer response to a small price increase, including:

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52. Howard A. Schelanski, *Antitrust Law As Mass Media Regulation: Can Merger Standards Protect The Public Interest?*, 94 CAL. L. REV. 371, 390 (2006); *Telex Corp. v. Int’l Bus. Mach’s. Corp.*, 510 F.2d 894 (10th Cir. 1995) (reversing the district court’s relevant market definition on the grounds of supply substitution, stating that it was too narrowly defined. The Tenth Circuit expanded the relevant market to include all peripherals, including those not compatible with IBM’s computers).
  53. *Kalmanovitz v. G. Heileman Brewing Co.*, 576 F.Supp. 922, 927 (D. Del 1983) (citations omitted); *see generally* *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir.1945).
  54. *See* Schelanski, *supra* note 52, at 390.
  55. *See* Horizontal Merger Guidelines, *supra* note 48, at § 1.18–13.
  56. *Id.* § 4, at 7.
  57. *Id.* § 4.1.1, at 9. In general, prices for the specific industry are taken into consideration.
  58. *Id.* § 4.1.2, at 10.
  59. *Id.* § 4.1.3, at 12.



evidence that buyers have shifted or have considered shifting purchases between products in response to relative changes in price or other competitive variables;

evidence that sellers base business decisions on the prospect of buyer substitution between products in response to relative changes in price or other competitive variables;

the influence of downstream competition faced by buyers in their output markets; and

(4) the timing and costs of switching products.<sup>60</sup>

If the agency determines that there would be no response to a small price increase, then the agency moves to the “next best substitute” and again considers whether a monopolist reaps a profit given a price increase.<sup>61</sup> This process continues until the agency finds the smallest product grouping where a price increase would be profitable.<sup>62</sup> The FCC may refer to these guidelines when investigating anticompetitive conduct.<sup>63</sup> Although many courts have relied upon various portions of the joint guidelines that are relevant to a particular case, few courts have used all of the guidelines’ features.<sup>64</sup>

## 2. Court Decisions

Courts consistently follow the product market analysis set forth in *United States E.I. du Pont de Nemours & Co.*<sup>65</sup> A product market includes all potential substitutes for the product from the perspective of the sellers and the buyers.<sup>66</sup> All products in a relevant market exhibit high “cross-elasticity”

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60. *Id.* § 4.1.3, at 11–12.

61. *Id.* § 4.1.3, at 12. This process assumes that the prices are competitive.

62. *Id.*

63. Samuel J. Gordon, Note, *Are You Sirius? The Mistake Of Conditioning Approval Of The Sirius-XM Merger On A Price Cap*, 3 BROOK. J. CORP. FIN. & COM. L. 513, 517 (2009).

64. *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995) (finding that the market was gasoline because self-serve and full-service vendors would respond the same way if a more profitable product were introduced).

65. *See Barr Laboratories, Inc. v. Abbott Laboratories*, 978 F.2d 98, 111–12 (3rd Cir. 1992); *see Walpa Constr. Corp. v. Mobile Paint Mfg. Co.*, 701 F. Supp. 23, 26 (D. P.R. 1988); *Telex Corp. v. Int’l Bus. Mach. Corp.*, 510 F.2d 894, 917–18 (10th Cir. 1975); *see Southern Pac. Communications Co. v. American Tel. & Tel. Co.*, 556 F. Supp. 825, 871–72 (D. D.C. 1982); *see PSKS, Inc. v. Leegin Creative Leather Prods.*, 2009 WL 938561, at \*2–\*3 (E.D. Tex. Apr. 6, 2009).

66. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956) (holding that the relevant market for cellophane included other flexible wrappings because they have the same qualities and were relatively interchangeable with cellophane.); *see HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 83 (3d ed. 2005); *see, e.g., IBM*,

of demand, which means that the products are relatively interchangeable by consumers for the same purposes.<sup>67</sup> Courts look at the relative interchangeability between the product in question and other potential competing products.<sup>68</sup> One way courts determine relative interchangeability is by looking at how price changes affect consumers. In other words, courts focus on how competing products limit the seller's ability to raise prices. However, the analysis is not as simple as looking at effects of price changes. Consumers may look at a number of factors when deciding whether to purchase a good or a service, with price being only one of many considerations. Consumers might be willing to pay more for a product with superior product quality. Thus, courts take into consideration factors such as price, use, and qualities when determining interchangeability.<sup>69</sup>

Under a price analysis, courts observe how changes in price for one product would affect the demand for another.<sup>70</sup> If a price increase for one product causes consumers to purchase an alternative product, then those two products compete with each other within the same product market.<sup>71</sup> For example, if a consumer shifts from buying mechanical pencils to buying ball-point pens in response to a small price increase in mechanical pencils, then the relevant market is not confined solely to mechanical pencils. It must also include ball-point pens because they are relatively interchangeable with mechanical pencils. However, the relevant market might be broader than merely mechanical pencils and ball-point pens in light of how a consumer uses the products.

Courts also consider consumer use when determining reasonable interchangeability.<sup>72</sup> Continuing with the mechanical pencil analogy, the relevant market might also include fountain pens, wood pencils, gel pens, and similar products used in a similar fashion. However, the product market may not include highlighters because a consumer likely does not consider a highlighter as a reasonable substitute to a mechanical pencil. The main objective

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510 F.2d at 917–19; *Southern Pac. Commc'ns*, 556 F. Supp. at 871–72; see *PSKS*, 2009 WL 938561, at \*2–3.

67. *du Pont*, 351 U.S. at 400 (calling for an “an appraisal of the ‘cross elasticity’ of demand in the trade” to determine whether the “commodities [are] reasonably interchangeable by consumers for the same purposes”).

68. *Id.* at 404; *Int’l Boxing Club of New York, Inc. v. United States*, 358 U.S. 242, 250 (1959).

69. *du Pont*, 351 U.S. at 404.

70. *Id.* at 400.

71. See Horizontal Merger Guidelines, *supra* note 48; see also *du Pont*, 351 U.S. at 400.

72. *du Pont*, 351 U.S. at 396.

under the use analysis is to determine whether consumers would easily shift between products.<sup>73</sup>

Qualities also play a role in determining the product market.<sup>74</sup> In *du Pont*, the Court considered whether the physical characteristics of cellophane and other flexible wrappings were sufficiently similar in quality to be included in the same product market.<sup>75</sup> The Court stated that consumers specifically bought cellophane to be able to see through packaging to determine food freshness: something they could not do with an opaque flexible wrapping.<sup>76</sup> Thus, the Court held that the product market included all flexible wrappings, excluding any opaque flexible wrappings.<sup>77</sup> In another case, *United States v. Grinnell Corp.*, the Court relied upon product quality to exclude certain products from the product market because they were less reliable and thus, less desirable.<sup>78</sup> Continuing with the mechanical pencil analogy, certain writing instruments may be excluded from the relevant product market because they do not possess the same qualities required by the user. A thick permanent marker will not likely fall within the same product market as a mechanical pencil because the writing qualities of the two instruments are very different.

### 3. Primary Market Analysis

The product market analysis for an Apple iPhone begins by identifying the reasonable interchangeability of mobile devices. The standard contract term of two years<sup>79</sup> may complicate the analysis. Once locked into an agreement, consumers lack freedom to switch mobile devices at the drop of a hat. In addition, Apple does not allow consumers to switch their iPhones to other network providers even after the two year contract term is over.<sup>80</sup> This policy forces iPhone purchasers to either use AT&T wireless service if they want to use their iPhone or abandon their iPhone investment. This Article

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73. *Id.* at 394.

74. *See id.* at 394–400.

75. *Id.*

76. *Id.*

77. *Id.* at 400.

78. *United States v. Grinnell Corp.*, 384 U. S. 563, 574 (1966).

79. iPhone 3GS, Exclusively from AT&T and Apple, *available at* <http://www.att.com/wireless/iphone/> (last visited Nov. 3, 2010) (stating the iPhone is only available for “\*Qualified customers only. Two-year contract required.”).

80. Apple has incorporated a few hardware and software features in the iPhone that make it difficult to use an iPhone with wireless service providers other than AT&T. *See* Daniel Eran Dilger, *Unlocking the iPhone: The GSM SIM and Activation*, ROUGHLY DRAFTED MAGAZINE, Jul. 5, 2007, *available at* <http://www.roughlydrafted.com/2007/07/05/unlocking-the-iphone-the-gsm-sim-and-activation> (last visited Nov. 3, 2010).

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assumes that the consumer is ready to sign a contract and is free to make a decision to purchase any mobile device and any accompanying rate plan.<sup>81</sup>

An ordinary consumer might walk into a physical store, such as an AT&T store, or browse a webpage in search of a new mobile phone. Instantly, the consumer is bombarded with choices, including the many phones that are offered for free with a manufacturer's rebate. Do all these devices really compete with the iPhone? Will a change in price affect a user's propensity to purchase an iPhone?<sup>82</sup>

Starting with Apple's iPhone, assume that Apple decreases the retail price for an iPhone 4 by five percent, from \$199 to \$189.<sup>83</sup> At the outset, many mobile devices are excluded from the product market almost automatically because of cost. When purchasing mobile devices, some consumers might gravitate toward free devices because price is a critical factor.<sup>84</sup> These consumers are not likely to purchase an iPhone. Based on the current pricing scheme, consumers are never able to obtain an iPhone free of charge.<sup>85</sup> Thus, free phones are not included in the relevant product market. For mobile devices of increasing cost to the consumer, a consumer might be willing to

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81. See Damon Darlin, *Getting Out of a 2-Year Cellphone Contract Alive*, N.Y.TIMES, Mar. 10, 2007 available at <http://www.nytimes.com/2007/03/10/technology/10money.html> (stating that contracts that lock consumers are a standard practice among most wireless providers).
82. As of Nov. 3, 2010, an 8GB iPhone 3GS retails for \$99. This version of the iPhone does not include all of the features of the iPhone 4, which retails at \$199 for the 16GB model and \$299 for the 32GB model. See Apple – iPhone - Compare iPhone 3GS and iPhone 3G, <http://www.apple.com/iphone/compare-iphones/> (last visited Nov. 3, 2010). The analysis in this section will change if the price of the iPhone continues to drop. See also, *5 Reasons to Buy the Apple iPhone 3g*, [http://www.pcworld.com/article/146896/5\\_reasons\\_to\\_buy\\_the\\_apple\\_iphone\\_3g.html](http://www.pcworld.com/article/146896/5_reasons_to_buy_the_apple_iphone_3g.html) (last visited Nov. 3, 2010) (listing price as number one in a list of 5 top reasons to buy an iPhone).
83. MacDailyNews.com, *Gartner: Apple iPhone Continues to Increase Global Smart Phone Market Share*, MacDailyNews.com, <http://macdailynews.com/index.php/weblog/comments/22068/> (last visited Nov. 3, 2010) (Recent price adjustments on the 8GB 3G iPhone “has produced a clear effect on sales volumes.”).
84. See Cell Phone Shopping and Service Buying Tips From Consumer Reports: Cell Phones and Services Buying Guide, <http://www.consumerreports.org/cro/electronics-computers/phones-mobile-devices/cell-phones-services/cell-phone-service-buying-advice/shopping-tips/cell-phone-shopping-tips.htm> (last visited Nov. 3, 2010).
85. Some current AT&T customers may be eligible for early upgrade pricing: \$99 (8GB 3GS), \$199 (16GB), or \$299 (32GB) with a new two-year contract. If the customers are not eligible for the discounted prices, the prices for the different iPhone models are: \$499 (8GB), \$599 (16GB), or \$699 (32GB). See Apple – iPhone - Compare iPhone 3GS and iPhone 4, <http://www.apple.com/iphone/compare-iphones/> (last visited Nov. 3, 2010).

purchase one mobile device over another based on price if it provided more bang for the buck, i.e. it is more useful to the consumer.

The line between the use and the quality prongs of the product market test is blurry since many of a mobile device's uses are also its qualities. For example, a consumer's desire to use a mobile device as a camera also describes the consumer's preferences in the device's qualities or characteristics. Accordingly, this article analyzes these two prongs simultaneously. An iPhone consumer is looking for more uses in the device than just a phone; the consumer also considers whether it has a camera and video capture capability, the camera resolution, data transmission speed, battery life, internet access, and data/text access, among other considerations.<sup>86</sup> Devices that do not include at least a majority of these features should not be included in the product market.

Devices that are capable of the features described above are commonly known as "smart phones." Smart phones are mobile devices "with color screens and heaps of features, like cameras and e-mail access."<sup>87</sup> A consumer looking for these uses or qualities would not consider a phone lacking them to be a reasonable substitute. Thus, the product market may be as broad as all smart phones.<sup>88</sup> Accordingly, the primary market is not limited to iPhones, but includes other phones that provide similar features.

#### 4. Aftermarket Analysis

Even though there is sufficient competition in the primary market of cell phones, or even smart phones, to provide cross-elasticity of demand, this does not preclude the possibility of Apple having market power in an aftermarket.<sup>89</sup> An aftermarket includes products and services that supplement, enhance or maintain the primary product or service.<sup>90</sup> In *Eastman Kodak Co. v. Image Technical Services, Inc.*, the primary products were photocopiers and micrographic equipment manufactured and sold by Ko-

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86. *Top 10 Reasons to Buy the iPhone 3GS*, <http://www.displayblog.com/2009/06/08/top-10-reasons-to-buy-the-iphone-3g-s/> (last visited Nov. 3, 2010) (listing top 10 reasons to buy an iPhone as: (1) 3.2 Megapixel Camera, (2) video, (3) voice control, (4) GPS, (5) voice memos, (6) 7.2mpbs HSPDA, (7) longer battery life, (8) water and oil resistant, (9) Nike+, and (10) faster processor.).

87. Lisa Guernsey, *The Cellphone's Potential as a Search Tool Gets Tapped*, N.Y. TIMES, May 4, 2005, available at <http://www.nytimes.com/2005/05/04/technology/techspecial/04guernsey.html> (last visited Nov. 3, 2010).

88. See PDAs & Smartphones, <http://www.wireless.att.com/cell-phone-service/cell-phones/pda-phones-smartphones.jsp> (last visited Nov. 3, 2010) (AT&T's website categorizes the iPhone as "Smart Phones").

89. See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466–67 (1992).

90. See *id.*

dak.<sup>91</sup> The defendant, Kodak, allowed vendors to service and provide maintenance for Kodak machines, which created an aftermarket for Kodak's photocopiers and micrographic equipment.<sup>92</sup> After some time, Kodak altered its policies regarding dealings with the aftermarket service vendors, perhaps after seeing an opportunity for financial gain.<sup>93</sup> Kodak implemented policies that limited the supply of parts needed for the plaintiffs to maintain and service the equipment.<sup>94</sup> The Court held that Kodak had market power over aftermarket parts and service, and imposed restrictions that prevented consumers from switching products in the primary market.<sup>95</sup> Customers who purchased expensive Kodak equipment were locked in to Kodak's aftermarket because of the high cost to switch equipment.<sup>96</sup> Because the aftermarket was imperfectly competitive, Kodak would not lose all sales in response to an increase in aftermarket prices.<sup>97</sup> While there was ample competition in the primary market of photocopiers and micrographic equipment, this fact had no bearing on Kodak's power over the aftermarket.<sup>98</sup> Thus, one can have monopoly power in an aftermarket even without such power in the primary market.

In contrast, in *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*,<sup>99</sup> the plaintiff, a franchisee, alleged that the defendant, the franchisor, abused its monopoly power by requiring the plaintiff to conform to franchise standards, including purchasing and using Domino's ingredients, beverages, packaging materials, and so forth.<sup>100</sup> The Third Circuit held that the plaintiff knew of these terms prior to signing the contract and refused to impose liability upon the defendant because the relevant market could not be defined by the contours of a contract.<sup>101</sup> This case contrasts with *Kodak* because Domino's Pizza did not alter or change any terms of the agreement after the agreement had been made.

Apple's denial looks more like *Kodak* and less like *Queen City Pizza* because Apple is adding restrictions to the terms and conditions. In *Queen City Pizza*, there was full disclosure of the terms and conditions, and the plaintiffs were on notice of all the terms and conditions prior to the agree-

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91. *Id.* at 454–55.

92. *See id.* at 454–57.

93. *See id.* at 465.

94. *Id.* at 458.

95. *Id.* at 475–77.

96. *Id.* at 476.

97. *See id.* at 475–76.

98. *Id.* at 470–72.

99. *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430 (3d Cir. 1997).

100. *Id.* at 433.

101. *Id.* at 439–40.

ment.<sup>102</sup> In contrast, an iPhone purchase agreement does not include any terms and conditions relating to acceptable marketplaces for aftermarket applications.<sup>103</sup> Further, the terms and conditions do not state that applications or Internet downloads are limited to those that Apple approves.<sup>104</sup> Technically speaking, Apple cannot change or alter contract terms that do not exist. Unilaterally filling in gaps of an existing contract amounts to a material modification or alteration of the original contract.<sup>105</sup> Requiring iPhone users to only install applications that Apple approves for the App Store serves as a modification of the terms and conditions, an issue the court addressed in *Kodak*. As a result, this case is similar to *Kodak*.

Another distinguishing aspect between the present case and *Queen City Pizza* is the amount of competition in the franchisee market. In *Queen City Pizza*, a great deal of competition existed in the franchisee market. Queen City Pizza could have alternatively entered into an agreement with McDonalds, Burger King, or other such franchise restaurant chains. Here, we are not dealing with alternative franchises. The App Store is the only source for aftermarket applications; there are no competing franchisees in the iPhone application market.

Moreover, interchangeability is not a factor because Apple has complete control over the applications available on the App Store.<sup>106</sup> Critics point out that the interchangeability test used in *du Pont* only holds when the competing products are sold at competitive prices.<sup>107</sup> Turner argues that a company could control prices and create a high demand cross-elasticity.<sup>108</sup> This means that one company might already have monopoly power and the prices are at the absolute maximum. Here, however, there are no competing products; the only products are the aftermarket applications approved for sale by Apple in the App Store. Thus, the relevant product market should be defined as iPhone's and all the aftermarket iPhone applications.

Similar to *Kodak*, Apple does not have market power over the primary market defined as smart phones. Apple does, however, control the aftermarket for iPhone applications. Here, iPhone applications serve as an aftermarket because they are purchased on an individual basis, and they

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102. *Id.* at 440.

103. Apple.com, *Application-Based Services Terms of Use*, [http://www.apple.com/internetservices/terms/membership\\_terms.html](http://www.apple.com/internetservices/terms/membership_terms.html) (last visited Nov. 3, 2010).

104. *Id.*; see Apple – iPhone – Buy iPhone, *infra*, note 116.

105. *Channell v. Citicorp Nat. Servs., Inc.*, 89 F.3d 379, 384 (7th Cir. 1996).

106. Interview with Apple Help Service, Live Chat Interview with Chetwin, AT&T Sales Representative, (Nov. 19, 2009) (“The only applications you can download and install on your iPhone must be purchased from the App Store. You can’t get them any other way.”).

107. Donald F. Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281, 308–10 (1956).

108. *Id.*

maintain or supplement the iPhone's software. The aftermarket mobile phone application market for smart phones is very large and important for iPhone users.<sup>109</sup> Apple features over 250,000 applications for sale in its App Store.<sup>110</sup> All applications sold in the App Store only work on Apple's iPhone and not on any other smart phone. Apple may argue that the aftermarket definition must be defined as all aftermarket applications for all smart phones because many application developers create aftermarket applications for use on many different smart phones. Indeed, the application at issue here was developed for multiple mobile platforms including the iPhone, Blackberry, and Android-based phones.<sup>111</sup> However, since the Google Voice application in question was intended for use on the iPhone, the product market should be defined as aftermarket applications purchased from Apple's App Store for use on the iPhone.

## B. Geographic Market

The second aspect of determining the relevant market is defining the geographic market. A geographic market is the area where a consumer looks for the goods or services he seeks to purchase.<sup>112</sup> The analysis should follow the consumer and not the seller. A geographic market is not where the seller attempts to sell the product.<sup>113</sup> The scope of the geographic market is a question of fact and should be determined in each case "in acknowledgment of the commercial realities of the industry being considered."<sup>114</sup>

Here, the geographic market analysis begins with where the consumer looks to purchase iPhones and applications for iPhones. A user seeking to purchase an iPhone has three options: a physical AT&T store, AT&T's website,<sup>115</sup> or Apple's website.<sup>116</sup> AT&T stores are geographically limited, but consumers can access the internet virtually anywhere, including while they

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109. Justin Lee, *Smartphone Market Trends*, SLIDE 79, <http://www.slideshare.net/lis186/smartphone-market-trends> (last visited Nov. 3, 2010) (positing that seventy-six percent of iPhone subscribers have installed applications, thus suggesting this market is important for the overwhelming majority of iPhone users).

110. *Apple – iPhone – Gallery – TV Ads*, *supra* note 14.

111. *See Google Voice for your mobile phone*, <http://www.google.com/mobile/voice> (last visited Nov. 3, 2010).

112. *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 212 (3d Cir. 2005).

113. *Tunis Bros. Co., Inc. v. Ford Motor Co.*, 952 F.2d 715, 726 (3d Cir. 1991).

114. *Gordon*, 423 F.3d at 212.

115. *AT&T Wireless*, <http://www.attwireless.com> (last visited Nov. 3, 2010).

116. *Apple – iPhone – Buy iPhone*, [http://store.apple.com/us/browse/home/shop\\_iphone/family/iphone](http://store.apple.com/us/browse/home/shop_iphone/family/iphone) (last visited Nov. 3, 2010).



fly.<sup>117</sup> Rather than looking to where a consumer could purchase an iPhone with AT&T service, a better approach to determining the geographic market might be to look at where a consumer could use the product. Assuming consumers demand a 3G data connection to download various applications, the geographic market is where AT&T provides 3G service.<sup>118</sup>

### C. Relevant Market Defined

The relevant market is defined by the product market and the geographic market.<sup>119</sup> Thus, the relevant market should be defined as: applications available for download and installation on the Apple iPhone using the App Store, wherever 3G service is available.

## III. MARKET POWER IN THE RELEVANT MARKET

Once the relevant product and geographic markets are defined, the next step in analyzing most anticompetitive behavior is determining whether the firm has market power.<sup>120</sup> Without market power, there is little reason to be concerned with the acts of a single firm under the antitrust laws.<sup>121</sup> Market power is the ability to raise prices above a competitive level for a sustained amount of time and not lose market share.<sup>122</sup> A firm that lacks market power cannot force or impose its products on consumers through its conduct. Nor could such a firm attempt to “price squeeze” by undercutting competitors or charging more than competitors.<sup>123</sup> When a firm has market power, it has the

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117. Scott McCartney, *In the Air, Wi-Fi Gets a Ho-Hum Reception*, WALL ST. J., Aug. 27, 2009, available at <http://online.wsj.com/article/SB10001424052970203706604574374571364228440.html> (last visited on Nov. 3, 2010).

118. For a map displaying AT&T's 3G service, see *AT&T Coverage Viewer*, <http://www.wireless.att.com/coverageviewer/> (last visited Nov. 3, 2010).

119. See discussion *supra* Part II.

120. See ABA SECTION OF ANTITRUST, MONOGRAPH NO. 12, HORIZONTAL MERGERS: LAW AND POLICY 153–61 (1986) (illustrating that the next step in analyzing anti-competitive behavior is to determine whether there is market power); see also Benjamin Klein, *Market Power in Antitrust: Economic Analysis After Kodak*, 3 SUPREME CT. ECON. REV. 43, 71–85 (1993) (outlining a framework to determine whether a firm possesses market power).

121. See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 500 (1992).

122. William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 937 (1981); 42nd Parallel North v. E Street Denim Co., 286 F.3d 401 (7th Cir. 2002); K.M.B. Warehouse Distributions, Inc. v. Walker Mfg. Co., 61 F.3d 123 (2d Cir. 1995).

123. See *Pac. Bell Tel. Co. v. Linkline Commc'ns Inc.*, 129 S.Ct. 1109, 1114 (U.S. 2009).

ability to force consumers to do something they would not do in a competitive market.<sup>124</sup>

A firm that possesses market power can control prices or exclude competition.<sup>125</sup> Direct evidence of the injurious exercise of market power is the best route to show market power.<sup>126</sup> If direct evidence of market power does not exist, then the existence of market power can be inferred from the seller's possession of a predominant share of the market.<sup>127</sup> While a market share can serve as a proxy for determining market power, it necessarily requires that the market definition accurately reflect commercial realities.<sup>128</sup> However, courts generally qualify inferences of market power from market share using factors including entry conditions, the size and stability of the market shares over time, and profitability.<sup>129</sup>

In *du Pont*, the government alleged that du Pont monopolized the cellophane market in violation of Section 2 of the Sherman Act.<sup>130</sup> The government, which has the burden of proving that the defendant possesses a high degree of market power,<sup>131</sup> argued that seventy-five percent of cellophane in the U.S. was produced by du Pont, and this showed, at least *prima facie*, that du Pont possessed market power.<sup>132</sup>

The FCC looks at a number of factors when determining whether a firm has a market power. In the *Motion of AT&T Corp. to be Reclassified as a*

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124. *Dickson v. Microsoft Corp.*, 309 F.3d 193, 207–09 (4th Cir. 2002).

125. *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1441 (9th Cir. 1995); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 239 (2d Cir. 2003); see *K.M.B. Warehouse*, 61 F.3d at 129.

126. *Rebel Oil*, 51 F.3d at 1421/1434.

127. *Eastman Kodak, Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 464 (1992); *United States v. Grinnell, Corp.*, 384 U.S. 563, 571 (1966); *Flegel v. Christian Hosp.*, 4 F.3d 682, 690 (8th Cir. 1993); see *K.M.B. Warehouse Distribs.*, 61 F.3d 123 (stating that market share is not the sole factor but it is a significant factor in a determination of market power); *Delaware & Hudson Ry. Co. v. Consol. Rail Corp.*, 902 F.2d 174, 179 (2d Cir. 1990) (holding that to establish that a firm has a market power, the accusing party must show the firm has a dominant share in a well-defined relevant market).

128. *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 318 (8th Cir. 1986); *Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825, 829 (9th Cir. 1971).

129. See, e.g., *Reazin v. Blue Cross & Blue Shield*, 899 F.2d 951 (10th Cir. 1990); *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215 (8th Cir. 1987) (asking whether there was a strong preference for the product and whether barriers to entry or expansion by competitors existed).

130. *United States v. E.I. du Pont, de Nemours & Co.*, 351 U.S. 377, 377–79 (1956).

131. *Id.* at 381.

132. *Id.* at 379–80.

*Non-Dominant Carrier*,<sup>133</sup> the FCC considered four factors: (1) “AT&T’s market share”; (2) “the supply elasticity of the market”; (3) “the demand elasticity of AT&T’s customers”; and (4) “AT&T’s cost structure, size and resources.”<sup>134</sup>

If the relevant market is defined as applications available for download and installation on the Apple iPhone using the App Store, wherever 3G service is available,<sup>135</sup> then Apple’s market power is readily defined. Apple has 100% of the market share of applications available for sale in its App Store.<sup>136</sup> The requirements that Apple must approve each application before it can be included in the App Store and that the iPhone software will only allow applications from the App Store both create a significant barrier to entry, even to the point of foreclosing any aftermarket competitors.

Apple’s revenues from iPhone applications are hotly debated. Apple maintains that the App Store was designed to break even or better.<sup>137</sup> Analyst predictions of App Store revenues range from \$20 million per year to \$110 million per year, although those figures do not account for operating costs.<sup>138</sup> As a new industry,<sup>139</sup> the size and stability of the iPhone application industry is difficult to measure. Given Apple’s unfettered ability to control all applications in the App Store, Apple possesses market power the iPhone application market.

#### IV. MONOPOLY POWER IN THE RELEVANT MARKET

A firm has monopoly power when it has the ability to control prices or exclude competition in a relevant market.<sup>140</sup> Possession of monopoly power,

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133. *In re Establishment Of Rules And Policies For The Digital Audio Radio Satellite Service In The 2310–2360 Mhz Frequency Band*, 11 F.C.C.R. 3,271, 3,293,3271, 3293-94 (1995).

134. *Id.*

135. *See supra* Part II.3.

136. Interview with Apple Help Service, Live Chat Interview with Chetwin, AT&T Sales Representative, (Nov. 19, 2009) (“The only applications you can download and install on your iPhone must be purchased from the App Store. You can’t get them any other way”).

137. Interview by Dan Moren and Philip Michaels, Macworld.com, with Peter Openheimer, Senior Vice-President and Chief Financial Officer, Apple Inc. (Jul. 21, 2008) *available at* <http://www.macworld.com/article/134594/2008/07/live-update.html>.

138. Philip Elmer-DeWitt, *How Apple profits from the App Store*, CNN MONEY, May 14, 2009, <http://brainstormtech.blogs.fortune.cnn.com/2009/05/14/how-apple-profits-from-the-app-store/> (last visited Nov. 3, 2010).

139. *See supra* note 13 (describing that the Apple App Store opened just over a year ago).

140. *United States v. E.I. du Pont, de Nemours & Co.*, 351 U.S. 377, 389 (1956).

however, requires something greater than simply possessing market power.<sup>141</sup> While market share is useful when defining a firm's market power, it does not carry much weight in monopoly power determinations.<sup>142</sup> Having a substantial market share alone is "not enough to determine a firm's capacity to achieve a monopoly."<sup>143</sup> Although a high market share helps support an inference of monopoly power, it is less important in markets with low entry barriers or where the firm is unable to control prices or exclude competitors.<sup>144</sup>

Similar to the analysis of whether Apple has market power, Apple has a 100% market share for aftermarket applications. The entry barriers are also substantially high—consumers may download and install only applications approved by Apple and found in the App Store.<sup>145</sup> This requirement alone essentially excludes all others from entering into this market because it forbids any application generally available on the internet, but not specifically approved by Apple, for download on the iPhone. Thus, Apple has monopoly power over applications for use on iPhones.

## V. THEORIES OF LIABILITY

In analyzing Apple's conduct relating to the Google Voice application, the FCC should, in addition to its investigation under the Communications Act, look to the antitrust laws to determine whether Apple is engaged in actionable anticompetitive behavior. Various theories of liability—such as abuse of monopoly power, refusal to deal, conspiracy, foreclosure and tying—all shed light on the FCC's investigation. The relevant market is now

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141. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 480 (1992).

142. *United States v. Microsoft*, 253 F.3d 34, 54 (D.C. Cir. 2001).

143. *Shoppin' Bag of Pueblo, Inc. v. Dillon Co.*, 783 F.2d 159, 162 (10th Cir. 1986); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 924 (9th Cir. 1980) ("[b]ind reliance upon market share, divorced from commercial reality, could give a misleading picture of a firm's actual ability to control prices or exclude competition").

144. *Oahu Gas Serv., Inc. v. Pac. Res., Inc.*, 838 F.2d 360, 366–67 (9th Cir. 1988).

145. While this is not stated in the terms of service, software limitations on the iPhone prevent iPhone owners from installing any third-party applications that are obtained from sources other than the App Store. See Jesus Diaz, *How to: Install Unofficial Apps on Your iPhone 3G or iPod Touch, Easily and Safely*, gizmodo.com, Mar. 7, 2009, <http://gizmodo.com/5166029/how-to-install-apps-on-your-iphone-3g-or-ipod-touch-easily-and-for-free> (last visited Nov. 3, 2010).

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clearly defined,<sup>146</sup> and Apple possesses both market<sup>147</sup> and monopoly power.<sup>148</sup>

### A. Abuse of Monopoly Power

One theory of liability turns on whether Apple's alleged denial of the Google Voice application amounts to an abuse of monopoly power. Under Section 2 of the Sherman Act, "[e]very person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony."<sup>149</sup> To monopolize or attempt to monopolize, a firm must first possess the ability to create monopoly power.<sup>150</sup> While a firm or person may obtain monopoly power "merely by virtue of his superior skill, foresight and industry,"<sup>151</sup> actions specifically intended to further or retain the monopoly power violate Section 2.<sup>152</sup>

Courts have looked at a monopolist's conduct to determine whether it abused its monopoly power. In *Kodak*, the Court reasoned that the aftermarket service vendors were "locked-in" to the product, which increased the cost of service because there were no other alternatives.<sup>153</sup> The Court held that Kodak had used the aftermarket service vendor's dependency on continuing to service Kodak's machines to its own advantage and announced that Kodak had abused its monopoly power.<sup>154</sup>

Courts also examine a monopolist's conduct when it is making statements to potential customers. In *Newcal Industries, Inc. v. Ikon Office Solutions*,<sup>155</sup> the Ninth Circuit addressed whether statements made to a potential customer were "a commercial advertisement or promotion" or contractual and binding in nature.<sup>156</sup> For a statement of fact to be a commercial advertisement or promotion, the court must find that the statement is: (1) commer-

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146. *See supra* Part II.3.

147. *See supra* Part III.

148. *See supra* Part IV.

149. 15 U.S.C. § 2 (2009).

150. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 432 (2nd Cir. 1945).

151. *Id.* at 430.

152. *Id.* at 429; *United States v. United Shoe Mach. Corp.*, 391 U. S. 244 (1968).

153. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 477–78. (1992).

154. *Id.* at 485–86.

155. *United States v. Mendez*, 513 F.3d 1038, 1054 (9th Cir. 2008).

156. *See also In re Apple & AT&T Anti-Trust Litigation*, 596 F.Supp.2d 1288 (where a consumer alleged that AT&T didn't disclose the roaming charges upfront after he was charged high roaming costs. The plaintiff was out of the country and his phone was passively checking his email. This survived a motion for summary judgment).

cial speech; (2) made by the defendant; (3) for the purpose of “influencing consumers to buy” its goods or services.<sup>157</sup>

Applying the *Newcal* factors, Apple’s advertisements are commercial speech because they invite consumers to purchase their iPhone. The second factor is easily satisfied as Apple publishes their advertisements on their webpage.<sup>158</sup> The third factor is more complex. Apple invites or influences consumers to by its iPhone, but does the advertisement also include statements that influence consumers to purchase applications? On one hand, Apple invites users to purchase the iPhone because there is “an app for just about anything.”<sup>159</sup> A reasonable user might assume that since Apple sells the iPhone, it also is the sole provider of the aftermarket applications. On the other hand, the advertisements do not specifically say there is an app for just about anything in the App Store. Consumers could reasonably believe that they can download and use apps for just about anything from any provider on the Internet. Additionally, AT&T offers “unlimited data,”<sup>160</sup> which may lead a consumer to believe that statement means they have unlimited ability to download an unlimited number of applications from an unlimited number of sources on the web.

Apple and AT&T also require users to sign up for an “unlimited data” plan to activate the iPhone.<sup>161</sup> Neither Apple’s terms of service nor AT&T’s terms of service include provisions that expressly limit iPhone users to only applications found in the App Store.<sup>162</sup> Surely Apple and AT&T will argue that unlimited data is limited by the device’s software and hardware capabilities. Software limitations would allow consumers to install only those programs that are designed for the iPhone. Similarly, hardware would limit an iPhone user from accessing a movie in surround sound, since the iPhone does not include surround sound hardware.

The provision “unlimited data” allows iPhone users unlimited access to all accessible content. To illustrate this argument, consider an example. Cable TV subscribers generally have unlimited access to watch TV. The subscribers are technologically limited by their TV, as they can only watch one program at a time on a single TV.

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157. *Mendez*, 513 F.3d at 1054 (citing *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 735 (9th Cir.1999)).

158. See Apple iPhone Gallery – TV Ads, *supra* note 1.

159. *Id.*

160. AT&T, Messaging & Data, [http://www.wireless.att.com/cell-phone-service/get-started/index.jsp?q\\_returnUrl=/cell-phone-service/services/services-list.jsp%3FcatId%3Dcat1470003%26LOSGId%3D%26catName%3DMessaging%2B%2526%2BData%26\\_requestid%3D10028](http://www.wireless.att.com/cell-phone-service/get-started/index.jsp?q_returnUrl=/cell-phone-service/services/services-list.jsp%3FcatId%3Dcat1470003%26LOSGId%3D%26catName%3DMessaging%2B%2526%2BData%26_requestid%3D10028) (enter zip code to obtain data plan information) (last visited Nov. 3, 2010).

161. *Id.*

162. See Apple.com, Application-Based Services Terms of Use, *supra* note 105.

However, Apple's argument that iPhone users have unlimited access is akin to a cable TV company telling its subscribers they can view the channel guide, but not watch any programs. Without Apple's approval, iPhone users can view internet sites, but not download programs. To be sure, iPhone users can browse the vast information available on the internet. But Apple's position is that users are prohibited from using downloadable content that can be accessed using the internet connection. Before determining whether this policy amounts to abuse of monopoly power, this Article will first analyze the duty to deal defense.

## B. Duty to Deal

In general, a business has the power to decide whether to do business with its competitors, providing the business does not abuse its monopoly power or attempt to monopolize.<sup>163</sup> This does not mean that the right to refuse to deal is left unqualified.<sup>164</sup> A firm does not have an affirmative duty to deal with its competitors, unless the refusal to deal is for the purpose of creating or maintaining a monopoly.<sup>165</sup> In such a case, refusal to deal can amount to anticompetitive behavior and violate Section 2 of the Sherman Act.<sup>166</sup>

In *Colgate*, the Court recognized a firm's right to refuse to deal with other businesses.<sup>167</sup> Subsequent cases have followed *Colgate* and provide guidance as to what types of conduct disallow a monopolist from refusing to deal. In *Kodak*, the Court reviewed a jury verdict that found that Kodak exercised a monopoly in violation of the Sherman Act.<sup>168</sup> Kodak refused to continue to sell photographic supplies to a retailer after the retailer declined to sell its business to Kodak.<sup>169</sup> The Court determined that *the jury could*

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163. See *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408–09 (2004).

164. *Trinko*, 540 U.S. at 408 (explaining that situations where a firm has an affirmative duty to deal with its competitors are very limited) (citations omitted); see also *Fashion Originators' Guild of Am. v. Fed. Trade Comm'n*, 312 U.S. 457 (1941) (holding that group boycotts or refusals to deal are not permissible because the group acts as a cartel against the interests of the free market).

165. *Colgate*, 250 U.S. at 307 (“[i]n the absence of any purpose to create or maintain a monopoly,” an entity may “freely exercise his own independent discretion as to parties with whom he will deal”); see also *Lorain Journal Co. v. United States*, 342 U.S. 143, 146–48 (1951) (finding a section 2 violation where a newspaper company refused to advertise for a business because it also advertised on a radio station).

166. *Trinko*, 540 U.S. at 408.

167. *Colgate*, 250 U.S. at 306–07 (noting that the government did not allege that Colgate breached an existing contract).

168. *Eastman Kodak Co. v. S. Photo Materials Co.*, 273 U.S. 359 (1927).

169. *Id.* at 368–69.

have reasonably determined that Kodak's refusal to deal was not "actuated by innocent motives," but rather "by an intention and desire to perpetuate a monopoly."<sup>170</sup> The Court affirmed the verdict, stating that Kodak's refusal to deal was "in furtherance of a purpose to monopolize."<sup>171</sup> Taking a similar position, in *Otter Tail Power v. United States*, the Court found a Section 2 violation when a monopolist refused to sell or transmit power to municipal power systems "solely to prevent" them from "eroding its monopolistic position."<sup>172</sup> The defendant was already in the business of providing services, and refused to provide the same services to others.<sup>173</sup> The Court held that the defendant's exclusionary refusal to deal supported its purpose to monopolize.<sup>174</sup>

In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, the plaintiff alleged that it had enjoyed a long-standing business relationship with the defendant.<sup>175</sup> The plaintiff argued that after the defendant became dominant in the relevant market, it changed its course of dealing and engaged in anticompetitive behavior by refusing to deal with the plaintiff.<sup>176</sup> The defendant refused to deal, even after the plaintiff offered to provide compensation at retail price.<sup>177</sup> In the Court's view, this refusal to deal demonstrates anticompetitive intent, because in an attempt to maintain their business relationship, the plaintiff provided an extraordinary offer to the defendant, but the defendant remained unavailing.<sup>178</sup>

In the past 5 years, the Court granted certiorari for two cases involving refusals-to-deal. In the first case, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, the Court distinguished the facts from Aspen because there were no previous course of dealings, and there were no allegations that the defendant decided to forfeit short-term profits in hopes of a long-term financial return.<sup>179</sup> In the second case, *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, the Court held that when a firm has no duty to deal at the wholesale level, and does not utilize predatory pricing at

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170. *Id.* at 375.

171. *Id.*

172. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 378 (1973).

173. *Id.* at 370-71, 377-78.

174. *Id.* at 378.

175. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 589-90 (1985).

176. *Id.* at 589-90, 591-92.

177. *Id.* at 608, 610-11.

178. *Id.*

179. *Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 399, 409-10 (2004).



the retail level, then the firm also has no duty to deal with its competitors in the context of a price-squeeze claim.<sup>180</sup>

To summarize almost eighty years of refusal-to-deal cases, the purpose and intent of the party's refusal plays a significant role in determining a violation of Section 2 of the Sherman Act. Unilateral refusals-to-deal intended to create or maintain a monopoly likely violate Section 2, while refusals based on other motivations could be lawful. Such other motivations are allowable "only if there are legitimate competitive reasons for the refusal."<sup>181</sup> Parties accused of participating in illegal refusals must provide adequate business justifications for the refusal to evade liability.<sup>182</sup> Trinko suggests that the courts will rarely impose an affirmative duty to deal: "[t]he Sherman Act is indeed the 'Magna Carta of free enterprise,' but it does not give judges carte blanche to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition."<sup>183</sup>

### 1. Did Apple Deny the Google Voice Application?

A threshold question is whether Apple denied the Google Voice application, or if it is still pending review. Apple, of course, maintains that it has not denied the application, but that it is under consideration.<sup>184</sup> Apple also readily advertises that it approves 95% of all applications within 14 days of submission.<sup>185</sup> Apple claims that it actively engages in providing application developers with "helpful feedback" by suggesting modifications to get the application approved.<sup>186</sup> Apple paints itself as an active participant in bringing as many applications to the App Store as possible.

The only helpful feedback Google claims to have received from Apple is that it believes that Google Voice duplicates the core dialer functionality of the iPhone, and that Apple did not want to allow applications that would replace the iPhone software.<sup>187</sup> This short explanation does not seem like helpful feedback that will help Google modify the application to work on the iPhone. Instead, it seems to prevent Google from competing with Apple in those applications or features. On the other hand, the essence of the Google Voice application is to perform phone related tasks, such as placing phone calls, listening to voicemail, and sending and receiving SMS messages. Apple cannot offer much explanation for a denial if the application cannot be

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180. *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 129 S. Ct. 1109, 1120 (2009).

181. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 483 (1992).

182. Jonathan B. Baker, *Promoting Innovation Competition Through The Aspen/Kodak Rule*, 7 GEO. MASON L. REV. 495, 496 (1999).

183. *Trinko*, 540 U.S. at 415–16.

184. Apple Resp., *supra* note 15, at 12.

185. *Id.* at 2, 6.

186. *Id.* at 2.

187. Google Resp., *supra* note 19, at 3.

changed in such a way that would make it allowable on the iPhone. Apple also states that it does not know whether the Google Voice application uses a Voice over Internet Protocol (“VoIP”) element in executing its functions.<sup>188</sup> A quick glance at the Google Voice website would have revealed this information. Even AT&T knew that Google Voice is not a VoIP service.<sup>189</sup> This statement begs the question of whether Apple actually considered Google’s application. In light of Apple and AT&T’s specific agreement to exclude VoIP,<sup>190</sup> an inquiry into whether the application used VoIP seems like a threshold question, or at least an important facet to consider early in the review process, something Apple did not do.

Another consideration that sheds light on whether Apple denied the Google Voice application is its treatment for three similar Google applications. These applications<sup>191</sup> allowed users to use Google Voice features on a mobile phone. Apple had previously approved these applications<sup>192</sup> and revoked the approval around the time Google submitted its own official application. A revocation tends to look more like a denial, not like an application pulled back for reconsideration.

The time between Google’s submission and Apple’s alleged denial shows that the decision to approve Google Voice is complex. Google submitted the Google Voice application to Apple for inclusion in the App Store at the beginning of June 2009. Apple’s alleged denial took place sometime before July 31, 2009.<sup>193</sup> This time period lapse is more than one month, placing it in a category of very few applications (5%) that take more than 14 days to approve. In light of Apple’s statements and this policy to approve 95% of all applications within 14 days of submission, if Apple is still reviewing the Google Voice application, it is either a difficult decision or Apple is dragging its feet. Given Apple’s lack of helpful feedback, its treatment of other similar applications, lack of transparency in the application review process, and the time elapsed since Google’s submission, Apple’s conduct suggests that Apple may have denied approval of the Google Voice application.

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188. Apple Resp., *supra* note 15, at 4.

189. Letter from James W. Cicconi, Senior Exec. Vice President-External and Legislative Affairs, AT&T Servs., Inc., to Ruth Milkman, Chief, Wireless Telecomms. Bureau, Federal Comm’n Comm’n, Proceeding RM-11361 at Fed. Comm’n, AT&T Response to Telecomms Bureau Letter, 9 (filed Aug. 21, 2009) [hereinafter AT&T Resp.] *available at*: <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020037203>.

190. Apple Resp., *supra* note 15, at 4; AT&T Resp., *supra* note 189, at 6–7.

191. Apple Resp., *supra* note 15, at 3 (The programs are GVDialer / GV Dialer Lite, VoiceCentral, GV Mobile / GV Mobile Free).

192. *Id.* at 2–3.

193. Google Resp., *supra* note 19, at 3–41.

## 2. Apple's Purpose or Intent in Denying the Google Voice Application

Determining Apple's purpose or intent in allegedly denying the Google Voice application is critical to the question of whether Apple has a duty to deal with Google. In its letter to the FCC in response to the inquiry, Apple cites multiple justifications for rejecting applications.<sup>194</sup> Apple asserted that it may reject applications based on content, protecting consumer privacy, or because the application is harmful to the device, the network, or both.<sup>195</sup> In other words, Apple will reject an application if it degrades the "core experience of the iPhone."<sup>196</sup>

Another reason Apple will choose to reject an application is if the application "in Apple's reasonable judgment may be found objectionable, for example, materials that may be considered obscene, pornographic, or defamatory."<sup>197</sup> Apple decides what it thinks is best for iPhone users and approves or denies an App Store application accordingly. For example, Apple will reject all applications that contain pornography.<sup>198</sup> On the other hand, Apple may decide to approve applications with objectionable content that may not be suitable for all audiences, such as graphic combat violence, provided an age appropriate rating accompanies the application.<sup>199</sup> In other words, Apple regards content as part of the core user experience.

The core experience also includes Apple's iPhone software.<sup>200</sup> Apple claims that its software is essential to the iPhone's "distinctive experience" and that it "spent a lot of time and effort developing [a] distinct and innovative way to seamlessly deliver core functionality of the iPhone."<sup>201</sup> Apple contends that the Google Voice application invades the iPhone's seamlessly designed software by replacing and disabling Apple's Visual Voicemail, by using a different method to manage SMS text messages, and by managing the Contacts database from Google's servers.<sup>202</sup>

Apple has a strong interest in ensuring the software on the iPhone works properly and smoothly. If a consumer becomes frustrated with software errors while running aftermarket applications, the consumer might opt to buy and use a different brand mobile device. Thus, Apple should be able to en-

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194. Apple Resp., *supra* note 15, at 4–65.

195. *Id.* at 5.

196. *Id.* at 2.

197. *Id.* at 5.

198. *Id.* at 2.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 2 (stating that Apple has not received any assurances from Google that contact details will only be used in appropriate ways).

sure that all aftermarket applications do not degrade the core experience. However, Apple may not reject applications for the purpose of creating or maintaining a monopoly.<sup>203</sup>

In Google's response to the FCC, it points out that Apple has approved other Google applications, such as Google Earth and the Google Mobile application.<sup>204</sup> The significance of these two applications is that both provide features that exist on the iPhone right out of the box. Google Earth is similar to the native maps application on the iPhone. The Google Mobile application includes capability to search the web, maintain a calendar, and manage photos—each performing functions similar to Apple's Safari browser, native calendar, and photo applications, respectively. Similar to Google Voice, these applications provide functionality that might be duplicative of applications native to the iPhone. A major difference between these applications and Google Voice is that Google Voice allegedly duplicates or replaces the core function of a mobile device—the ability to make and receive telephone calls.<sup>205</sup> Apple may have a pro-competitive justification in preserving the phone aspects of the device, but may not be as interested in the peripheral applications, such as web search, calendar or maps.

Apple contends that it isn't denying users from using Google Voice, as users have full access to the web-based version of Google Voice through Apple's Safari browser.<sup>206</sup> This statement, however, is misleading because the web-based version is not a perfect substitute. The web-based version of Google Voice lacks significant features that motivate consumers to install the application rather than use the web-based version. The features of the web-based version are limited.<sup>207</sup> For example, the web-based version does not allow direct access to the iPhone address book, which means iPhone users must maintain two sets of contacts: one on the native iPhone contact application and another with Google applications. Further, the web-based version does not dial directly from the application, while the installable app does.<sup>208</sup> Google argues that this lack of functionality actually impedes the device, while the downloadable application fosters and provides a more seamless experience to the iPhone user.<sup>209</sup> Essentially, Google argues that the application may actually improve the overall user experience, more so than with the web-based application.

When Google's application was denied, Apple iPhone users were the ones who suffered. With net-neutrality a topic of debate, many users are

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203. *See* United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

204. Google Resp., *supra* note 19, at 4.

205. Apple Resp., *supra* note 15, at 2.

206. *Id.* at 3.

207. Google Resp., *supra* note 19, at 5.

208. *Id.*

209. *Id.*

affected by Apple's denial of the application. After viewing an Apple advertisement, a reasonable consumer gets the impression that there is "an application for just about anything."<sup>210</sup> The consumer then goes to the nearest AT&T store, or to the web to purchase an iPhone, thinking that they can do just about anything with an iPhone. The consumer concurrently purchases an iPhone data plan that includes 2GB of data in the U.S.<sup>211</sup> The average consumer might understand this as meaning they can use the phone to access and download anything they please, as long as it was within the plan's usage limit. However, under Apple and AT&T's current practices, an iPhone user cannot download and install the Google Voice application, though its terms of service do not explicitly say this. In practice, the phone's use is limited to 2GB of the content Apple and AT&T approve.<sup>212</sup>

### 3. AT&T's Response

In its response letter to the FCC, AT&T attempted to explain that users should know and expect that iPhone applications can only be downloaded from the App Store.<sup>213</sup> AT&T posits that users are bombarded with a multitude of new electronic devices, each with its own set of benefits and limitations.<sup>214</sup> Referring to Amazon's Kindle as an analogy, AT&T argues that users understand that the Kindle includes free internet access for the lifetime of the product, but does not permit phone calls to or from the device.<sup>215</sup> AT&T's comparison is inadequate, however, because Amazon conspicuously displays the terms and conditions of the internet access in a large font under the product description.<sup>216</sup> In contrast, both Apple and AT&T do not provide similar information to the consumer about where they can obtain applications.

As an experiment, the Author attempted to simulate an ordinary consumer's experience when purchasing an iPhone in late 2009. The Author

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210. See Apple iPhone Gallery – TV Ads, *supra* note 1; see Apple – iPhone, Over 250,000 ways to make iPhone even better, *supra* note 2; see also *iPhone 3g Commercial "There's An App For That"* <http://www.youtube.com/watch?v=szrsfeyLzyg> (November 3, 2010).

211. Data Plans with Wi-Fi – DataPlus and DataPro Plans – Wireless from AT&T, <http://www.att.com/shop/wireless/plans/data-plans.jsp> (last visited Nov. 3, 2010).

212. For a discussion on deceptive business practices in the broadband realm, see Sandoval, *supra* note 47.

213. AT&T Resp., *supra* note 189, at 13; Apple Resp., *supra* note 15, at 1.

214. *Id.* at 3–4.

215. *Id.*

216. Amazon.com, Kindle Wireless Reading Device (6" Display, Global Wireless, Latest Generation): Kindle Store, [http://www.amazon.com/Kindle-Wireless-Reading-Display-Generation/dp/B0015T963C/ref=dp\\_ob\\_title\\_def](http://www.amazon.com/Kindle-Wireless-Reading-Display-Generation/dp/B0015T963C/ref=dp_ob_title_def) (last visited Nov. 3, 2010).

browsed both Apple and AT&T's website for terms and conditions regarding downloading and installing aftermarket applications. Neither website contained any information on what a user can install on an iPhone.<sup>217</sup> The AT&T site included an option to chat live with a customer service representative. The Author initiated a chat session, but the representative was unable to define or point to terms and conditions for aftermarket applications.<sup>218</sup> The representative stated that Apple controlled the aftermarket applications and provided the Author a phone number to speak with an Apple customer service representative. The Author then called the Apple representative, who likewise could not point to any terms and conditions governing aftermarket application use.<sup>219</sup> In the conversation, the Author asked if such a document or disclosure existed. The Apple representative responded by saying that there is no such document or disclosure and "the only applications you can download and install on your iPhone must be purchased from the App Store. You can't get them any other way."<sup>220</sup> This response begs the question of whether any iPhone purchasers really understand Apple's policies on aftermarket application use. The first generation iPhone displayed the terms and conditions on the box, which the consumer did not receive until after purchasing an iPhone. This box, however, does not mention any terms and conditions regarding applications.

Some iPhone users are annoyed enough that they have expressed their concerns to the FCC. After purchasing an iPhone, some users want to be able to install any application of their choosing, so long as it does not cause network disruption.<sup>221</sup> Their argument is that limiting a user's choice of applications is similar to buying a computer where the manufacturer mandates that the user may only run Microsoft Office and disallows any other alternative.<sup>222</sup> These dissatisfied users have also expressed similar concerns about not being able to run alternative software and complain that if Microsoft prevented Apple's Safari browser from working with Windows, Microsoft would be "in big trouble with the FCC."<sup>223</sup>

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217. See Apple.com, *Application-Based Services Terms of Use*, *supra* note 103.

218. Live Chat Interview with Chetwin, AT&T Sales Representative (Nov. 17, 2009).

219. Telephone Conversation, Apple Sales Representative (Nov. 17, 2009).

220. *Id.*

221. Letter from Paul Nuyujukian to FCC Regarding FCC Proceeding RM-11361 (Sept. 21, 2009), *available at* <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020038940>.

222. *Id.*

223. Letter from Thomas Anderson to FCC Regarding FCC Proceeding RM-11361 (Sept. 24, 2009), *available at* <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020039446>.

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#### 4. Apple's Justification

Apple may choose to deny an application is to honor its contractual agreements with AT&T, the exclusive service provider for the iPhone. In its response to the FCC, Apple cites to a private agreement with AT&T that obligates Apple not to approve any applications that would harm AT&T's 3G network.<sup>224</sup> Such harm includes legitimate concerns about efficiency and potential network congestion.<sup>225</sup>

Apple states that "[n]o contractual conditions or non-contractual understandings with AT&T have been a factor in Apple's decision-making process."<sup>226</sup> In essence, Apple's position is that Apple has not based its decisions regarding the Google Voice application for reasons relating to the private agreement with AT&T. Arguably, Apple makes this statement to avoid potential conspiracy charges, but this statement forecloses any arguments that the Google Voice rejection was based on concerns over harm to AT&T's network. Further, this statement may even amount to an admission by Apple that Google Voice does not cause harm to the network.

Apple's denial is similar to *Otter Tail Power*, where the defendant engaged in business with some companies but excluded others.<sup>227</sup> Applying *Otter Tail Power*, Apple's claims that the refusal was based on business justification of reasonable network management is not valid. Apple agreed to prevent any applications from harming AT&T's network.<sup>228</sup> Other smart phones, such as the Blackberry from Research-in-Motion and numerous Android-based devices, use the Google Voice application on the AT&T network. Nevertheless, had Apple not rejected the three applications that used the Google Voice features<sup>229</sup> and excluded Google, the application of *Otter Tail Power* to this case would have been much more compelling.

Similar to *Aspen Skiing*, where the parties enjoyed a long-standing business relationship which was a fundamental aspect of the holding, Google had reason to believe that Apple would approve the Google Voice application.<sup>230</sup> As mentioned earlier in this section, Apple had already approved Google Earth and Google Mobile applications.<sup>231</sup> Further support of Google's notion that Apple would approve Google Voice is that Apple had approved three

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224. Apple Resp., *supra* note 15, at 4.

225. *Id.*

226. *Id.* at 3.

227. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377–78 (1973).

228. Apple Resp., *supra* note 15, at 4.

229. See Apple Resp., *supra* note 15, at 4; AT&T Resp., *supra* note 189, at 6–7.

230. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608 (1985).

231. See Google Resp., *supra* note 19, at 4.

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applications that accessed and used the Google Voice service.<sup>232</sup> These three applications provided similar functionality as the proposed Google Voice application.<sup>233</sup>

Apple is not the first company to implement tight policies to ensure market dominance. Apple's policy to extend and maintain power over aftermarket applications is surprisingly similar to actions taken by Microsoft to maintain monopoly power in the computer operating system software market.<sup>234</sup> In *Microsoft*, the defendant identified software that could erode its monopoly power on computer operating systems and worked for over four years to prevent development of this software.<sup>235</sup> The court found that Microsoft took "exclusionary acts that lacked pro-competitive justification" by imposing various restrictions in its software.<sup>236</sup> The court further found that Microsoft imposed these restrictions not "to maintain a somewhat amorphous quality it refers to as the 'integrity' of the Windows platform, nor even to ensure that Windows afforded a uniform and stable platform for applications development," but to prevent other software from destroying its monopoly power over the relevant market.<sup>237</sup> Here, Apple's policy to oversee each and every application before approving for the App Store bears a striking resemblance to Microsoft's exclusionary acts to preclude competition because it crosses the line from a legitimate business decision into an anticompetitive one.<sup>238</sup> Additionally, Apple's attempt to maintain the core experience of the iPhone mirrors Microsoft's argument that its actions were based on maintaining the integrity of the Windows platform.<sup>239</sup> Considering the totality of the circumstances, Apple's refusal to permit the Google Voice application points toward an illegal intent to monopolize.

### C. Conspiracy

Agreements to create or further a monopoly are unlawful. Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce."<sup>240</sup> One purpose of Section 1 is to penalize agreements to commit monopolistic behavior between at least two parties acting jointly.<sup>241</sup> For liability under Section 1 of the Sherman Act, the parties

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232. Apple Resp., *supra* note 15, at 3.

233. *Id.*

234. *See* United States v. Microsoft Corp., 87 F.Supp.2d 30, 38 (D.C. Cir. 2000).

235. *Id.* at 38.

236. *Id.* at 39–42.

237. *Id.* at 41.

238. Apple Resp., *supra* note 15, at 4.

239. *Id.* at 4–5.

240. 15 U.S.C. § 1.

241. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984).



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must share a “unity of purpose or a common design and understanding or a meeting of the minds in an unlawful arrangement.”<sup>242</sup>

In some instances, the offenders formalize an agreement. In *Parke Davis*, the defendant conspired with wholesalers to withhold products from retailers that did not observe the defendant’s suggested retail prices.<sup>243</sup> *Parke Davis* enlisted the wholesalers to enforce its decision to refuse to deal with the offending retailers.<sup>244</sup> When a retailer failed to comply, *Parke Davis* supplied the wholesaler the information and the wholesaler subsequently stopped the supply of goods to the retailers.<sup>245</sup> The Court held that this arrangement was an illegal conspiracy that violated the antitrust laws.<sup>246</sup> The Court reasoned that *Parke Davis* could have merely announced its policy that it would not deal with retailers that did not follow its policy regarding suggested retail prices.<sup>247</sup> However, under the Sherman Act, *Parke Davis* could not co-opt the wholesalers to enforce their policy.<sup>248</sup>

When an explicit agreement to engage in anticompetitive behavior does not exist, the question turns toward whether there is evidence of such an agreement.<sup>249</sup> In many instances, parties make covert agreements that are difficult to discover. Plaintiffs bear the burden of proving the existence of an agreement.<sup>250</sup> This burden is governed by the preponderance of the evidence standard.<sup>251</sup>

During discussion around the iPhone offering, Apple and AT&T entered into a contractual agreement making AT&T and Apple the only authorized

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242. *Id.* at 771.

243. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 34 (1960).

244. *Id.* at 45.

245. *Id.*

246. *Id.* at 47–48.

247. *Id.* at 45.

248. *Id.*

249. *United States v. General Motors Corp.*, 384 U.S. 127, 142–43 (1966) (“[E]xplicit agreement is not a necessary part of a Sherman Act conspiracy . . . [where] joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan”); *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 720 (1965) (“Goldberg, J., dissenting”) (“[O]nly rarely will there be direct evidence of an express agreement”); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 765–66 (1984) (discussing how a newsletter from a distributor to a dealer-customer discussing various incentives and shipping policies and a assurance to maintain a minimum market price was enough to show evidence of a conspiracy).

250. *Monsanto*, 465 U.S. at 763 (requiring the plaintiff to present sufficient evidence to meet its burden of proving an agreement to fix prices).

251. *Bourjaily v. United States*, 483 U.S. 171, 175 (1987).

iPhone dealers and naming AT&T as the exclusive service provider.<sup>252</sup> In addition, because the two parties entered into the agreement before the App Store opened, the two parties maintain it does not include specific provisions about applications for iPhones.<sup>253</sup> This does not imply that other agreements do not exist, as both parties mention a covert mutual agreement that disallows VoIP services and applications on the 3G network.<sup>254</sup> AT&T claims that it has conducted “general discussions” with Apple regarding issues relating to network management and congestion.<sup>255</sup>

While the record lacks direct evidence of an agreement to monopolize, surrounding evidence sheds light on whether such an agreement exists. Perhaps the most damaging evidence is Apple’s inclusion of an AT&T application that is strikingly similar to Google Voice. The application, AT&T Virtual Receptionist,<sup>256</sup> allows the consumer to create a new, personalized toll-free number, show this new number on the receiving phone’s caller ID when making calls from an iPhone, custom call forwarding to up to three other phones, and check voicemail directed to the new number using the iPhone.<sup>257</sup> Google Voice includes all these features, but Google Voice also includes SMS text messaging features<sup>258</sup> that AT&T Virtual Receptionist lacks. Google Voice is entirely free<sup>259</sup> while AT&T Virtual Receptionist charges a recurring fee after the first 60 minutes.<sup>260</sup> Both products use regular cell phone minutes when calling or receiving calls. Another difference between the two applications is the way they place outbound calls. AT&T Virtual Receptionist appears to use the iPhone contacts program, although

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252. Apple Resp., *supra* note 15, at 1.

253. AT&T Resp., *supra* note 189, at 11.

254. This agreement has now been nullified and AT&T allows VoIP applications, such as Skype, to use the 3G network. Letter from Robert W. Quinn, Senior Vice President, Fed. Regulatory, AT&T Services, Inc., to Ruth Milkman, Chief, Wireless Telecomms. Bureau, Fed. Commc’ns Comm’n, Proceeding RM-11361 (filed Oct. 6, 2009) *available at* <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020040868> (last visited Nov. 3, 2010).

255. AT&T Resp., *supra* note 189, at 5.

256. *Id.* at 13 (stating that it developed this application using the Apple SDK).

257. Apple App Store, AT&T Virtual Receptionist, *available at* <http://itunes.apple.com/us/app/at-t-virtual-receptionist/id305465217?mt=8> (last visited Nov. 3, 2010).

258. Google Resp., *supra* note 19, at 1.

259. John C. Dvorak, *Google Voice: Free Calling Has Arrived*, PCMag.com, Nov. 17, 2009, <http://www.pcmag.com/article2/0,2817,2355955,00.asp> (last visited Nov. 3, 2010).

260. *See* AT&T Virtual Receptionist, *supra* note 257, *see also* AT&T Resp., *supra* note 189, at 6–7.

users can create a favorites list within AT&T Virtual Receptionist.<sup>261</sup> Google Voice dials directly from the iPhone while AT&T Virtual Receptionist places a call to its Virtual Receptionist service, which then dials the recipient's number.<sup>262</sup> This feature might serve as the distinguishing factor between Google Voice and AT&T Virtual Receptionist because Apple can argue that Google Voice replaces the core user experience while AT&T Virtual Receptionist does not. Google may counter this argument through data that demonstrates Google Voice is more efficient than Apple and AT&T's combined software, or by showing that Google also uses a similar relay service to route calls.

Apple's approval of AT&T's Virtual Receptionist application while rejecting Google's application raises the issue of whether Apple and AT&T have conspired to exclude Google from competing. Certainly Apple appears to have sufficient reasons. Apple has spent years developing both the physical appearance and the user interface of the iPhone.<sup>263</sup> In Apple's eyes, the Google Voice application may be an attempt to take over the iPhone device by means of a "Trojan Horse." Since Apple receives thirty percent of the aftermarket application sales revenues,<sup>264</sup> another reason for rejecting Google Voice is because it would be offered for free. To the extent that Google Voice is free, Apple would not receive any financial benefit by including the application in the App Store. Google might argue that Google Voice enhances the core experience by adding functionality that does not exist out of the box. Further, Google Voice does not disable the iPhone, nor does it affect the retail price of the phone. Regardless of whether an application generates revenue for application purchases, a free application may encourage new users to purchase an iPhone to take advantage of the application.

In its defense, Apple may argue that both Apple and AT&T have not conspired to monopolize. Rather, the agreement between the parties is for legitimate business purposes. One reason for the agreement is to ensure applications do not harm AT&T's network.<sup>265</sup> This is a viable reason because allowing applications that could potentially create congestion or bog down the network is a disservice to all network users. Apple might also point out that AT&T runs its own application service. The store, called AppCenter, is

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261. AT&T Virtual Receptionist User Guide, [http://mobile.ringcentral.com/subdomains/iphone/ATT\\_VR\\_userguide\\_v03.pdf](http://mobile.ringcentral.com/subdomains/iphone/ATT_VR_userguide_v03.pdf), page 14 12 (last visited Nov. 23, 2010)

262. *Id.* at 13.

263. *See* Apple Resp., *supra* note 15, at 1.

264. iPhone Developers Program – 3. Distribute Your Application, <http://developer.apple.com/iphone/program/distribute.html> (last visited Nov. 3, 2010) (stating that developers get to keep 70% of the revenue).

265. *See* Apple Resp., *supra* note 15, at 4–5.

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available to all AT&T phone service users.<sup>266</sup> Even though AT&T is the exclusive service provider for Apple's iPhones, iPhone users cannot download material from the AppCenter.<sup>267</sup> This fact is evidence against a conspiracy between AT&T and Apple because it shows that Apple is not favoring the other allegedly conspiring party. However, if Apple approves all of AT&T's applications for the App Store, then this distinction is of no consequence. As discussed, Apple virtually disclaimed any argument that it denied Google Voice because of reasonable network management.

#### D. Foreclosure

AT&T and Apple's exclusive dealing agreement raises the question of whether this agreement forecloses other potential competitors from entering the market. In general, the mere existence of an exclusive dealing contract does not trigger a violation of U.S. antitrust laws.<sup>268</sup> Under the rule of reason, exclusive dealing contracts are not prohibited by U.S. antitrust laws unless the result is a foreclosure of market alternatives.<sup>269</sup> Exclusive dealing contracts are illegal under very limited circumstances. Such instances include proof of substantial market foreclosure, injury to competition, or specific intent to fix prices or destroy competition.<sup>270</sup>

The exclusive dealing contract between AT&T and Apple relates to the phone and data service for the iPhone. The contract does not name AT&T as the exclusive provider of applications available for the iPhone in the App Store. Certainly Google cannot argue that AT&T has substantially foreclosed it from creating applications for the App Store because Apple has not imposed a complete prohibition on all Google applications. Apple offers at least two applications in the App Store: Google Earth and Google Mobile application. This shows that the exclusive dealing contract between Apple and AT&T is for wireless service and does not extend to applications. Effects on wireless service, however, may influence Apple's approval of applications if they cause network harm.

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266. AT&T AppCenter, <https://appcenter.wireless.att.com/> (last visited Nov. 3, 2010).

267. On the AppCenter webpage, AT&T provides a list of the cell phone manufacturers. Apple is not listed as a manufacturer and the site does not provide any applications available for download to an iPhone.

268. *E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, Inc.*, 357 F.3d 1, 4–5 (1st Cir. 2004).

269. *CDC Techs., Inc. v. IDEXX Labs., Inc.*, 186 F.3d 74, 80 (2d Cir. 1999).

270. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 328 (1961) (addressing substantial market foreclosure); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 11–12 (1984) (addressing restraint of horizontal competition); *Appalachian Coals v. United States*, 288 U.S. 344, 376 (1940) (addressing intent to fix prices); *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 627 (1953) (addressing intent to destroy competition).

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## E. Tying

Apple's requirement that all applications for the iPhone must be downloaded from the App Store raises the question of whether this policy is illegal tying. Under U.S. antitrust laws, tying exists when the accused party has economic power over the tying market.<sup>271</sup> To be unlawful tying, the seller must possess market power in the tying product; monopoly power in the tying product is not required.<sup>272</sup> Economic power in the tying market can be supported by allegations showing either that the seller of the tying product has a large enough share of the relevant market in that product to give the seller some power over the market, or that the tying product is so unique or desirable as to give the seller of that product an advantage over other competitors in the market.<sup>273</sup> Section III provides an analysis of Apple's market power.<sup>274</sup>

Two types of tying exist: conventional tying and negative tying. Conventional tying exists when one product is sold on the condition that the purchaser also purchases a second product.<sup>275</sup> For illustrative purposes, consider a consumer looking to purchase a high-end bread maker. A seller offers to sell the bread maker on the condition that the purchaser also purchases flour from the seller. The requirement to buy flour from the seller is tying. The product the consumer wishes to purchase, the bread maker in this example, is called the tying product. The second product, the flour, is called the tied product because it is tied to the first.

In contrast, a negative tying arrangement is an agreement to sell a product on the condition that the purchaser agrees not to purchase the second product from any other seller or supplier.<sup>276</sup> Using the bread maker analogy above, instead of requiring the purchaser to buy flour from the seller, the seller imposes a condition that the buyer will not purchase flour from any supplier other than the seller. Effectively, this type of negative tying renders the tying product useless unless the purchaser also purchases the tied product.

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271. *Baxley-DeLamar Monuments, Inc. v. Am. Cemetery Ass'n*, 843 F.2d 1154, 1156–57 (8th Cir. 1988).

272. *Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 31 (2006).

273. *Baxley-DeLamar*, 843 F.2d at 1156–57.

274. *See supra* Part III.

275. *Black v. Magnolia Liquor Co.*, 355 U.S. 24, 25 (1957); *Standard Oil Co. of Cal. & Standard Stations v. United States*, 337 U.S. 293, 305–306 (1949); *United States v. Paramount Pictures*, 334 U.S. 131, 156–59 (1948); *Int'l Salt Co. v. United States*, 332 U.S. 392, 394–95 (1947); *Mercoid Corp. v. Minneapolis Honeywell Regulator Co.*, 320 U.S. 680 (1944).

276. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

The first step in analyzing whether tying exists is determining the tied product and the tying product.<sup>277</sup> The tying product is generally the product the consumer seeks and the tied product is one that the consumer is forced to purchase.<sup>278</sup>

Here, the iPhone is the tying product. The iPhone has a number of features that attract consumers. First the iPhone is much thinner than most of its competitors. In addition, the iPhone has a large hard drive and doubles as an mp3 player, obviating the need to carry around both a phone and an mp3 player. Many consumers may seek the status of owning an iPhone<sup>279</sup> or to have access to more than 250,000 applications available in the App Store.<sup>280</sup>

Alternatively, users may be more inclined to select a phone based on a few important or critical applications, than to select a phone that will run the desired applications, as discussed above. For instance, the Google Voice application is available for Blackberry mobile devices. If the most important aspect is the ability to use Google Voice on a mobile device, users are free to choose a Blackberry or Android-based device. While this scenario is possible, it is probably limited to a narrow group of individuals and thus the theory is not generally applicable. Consumers are more likely to choose a phone and use the available applications rather than choose any phone that runs a specific application. Thus, the tying product is the iPhone and the tied products are the applications in the App Store.

Since Apple does not require users to purchase apps from the App Store, the App Store looks more like negative tying. Should an iPhone user wish to download and install an application for their iPhone, Apple forces the user to purchase from the App Store only. However, Apple allows its competitors to submit applications to the App Store and approves most of them. Although Apple may decide not to approve an application based on its sole discretion and unclear guidelines,<sup>281</sup> as discussed earlier,<sup>282</sup> Apple has approved at least two of Google's applications, which are for sale in the App Store. Considering all these factors, Apple's mandate that all applications must be downloaded from the App Store is not illegal tying.

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277. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 462–63 (1992).

278. *Id.*

279. Mark Milian, *Apple removes \$1,000 featureless iPhone application*, L. A. TIMES, Aug. 7, 2008, available at <http://latimesblogs.latimes.com/technology/2008/08/iphone-i-am-ric.html> (last visited Nov. 3, 2010).

280. Apple iPhone Gallery – TV Ads, *supra* note 1.

281. See Apple Resp., *supra* note 15, at 1–2.

282. See Google Resp., *supra* note 19, at 4.

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## VI. HOW THE FCC SHOULD ANALYZE THE GOOGLE VOICE PETITION REGARDING THE IPHONE

As noted earlier,<sup>283</sup> the FCC should take antitrust laws and potential antitrust violations into account during the inquiry process when analyzing Apple's alleged rejection of the Google Voice application. Recognizing antitrust issues is helpful when analyzing conduct under Section 1 of the Communications Act. The FCC is also responsible for ensuring that communication systems in the United States are organized in such a way that they serve the interests of the people.<sup>284</sup> In some instances, the public interest standard may clash with the antitrust laws.<sup>285</sup> If this happens, the FCC's duty to ensure that public interests are best served supersedes antitrust enforcement.<sup>286</sup> For example, the FCC has allowed large firms to gain significant monopolies provided that the merging firms consent to regulations that serve the public interest.<sup>287</sup>

The Communications Act of 1934 and the Telecommunications Act of 1996 provide the FCC with statutory authority to regulate the communications industry. Under Section 201(b) of the Communications Act of 1934, all practices in connection with communication service "shall be just and reasonable, and any . . . practice . . . that is unjust or unreasonable is declared to be unlawful."<sup>288</sup> Section 202(a) further provides that any carrier that engages in "any unjust or unreasonable discrimination" practices in connection with the communications industry through "unreasonable preference or advantage" violates the Communications Act.<sup>289</sup>

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283. See *supra* note 24.

284. The Benton Foundation: The Public Interest Standard in Television Broadcasting, [http://www.benton.org/initiatives/obligations/charting\\_the\\_digital\\_broadcasting\\_future/sec2](http://www.benton.org/initiatives/obligations/charting_the_digital_broadcasting_future/sec2) (last visited Nov. 3, 2010). Examples of policies that serve the public interest include: fostering diversity of programming, ensuring electoral candidates access to the airwaves, providing diverse views on public issues, encouraging news and public affairs programming, promoting localism, developing quality programming for children, and sustaining a separate realm of high-quality, noncommercial television programming.

285. Maurice E. Stucke, Allen P. Grunes, *Antitrust and The Marketplace of Ideas*, 69 ANTITRUST L.J. 249, 287–95 (2001).

286. *Id.* at 292 (the FCC has a duty to enforce the Telecommunications Act under the public interest standard).

287. See AT&T Mergers; *In re* Review of AT&T Inc. and BellSouth Corp Application For Consent to Transfer of Control, WC Docket No. 06-74, Memorandum Opinion and Order, 22 F.C.C.R. 5662 (2007).

288. 47 U.S.C. § 201(b) (2008).

289. 47 U.S.C. § 202(a) (2008).

The exemplary case of *Carterfone* sheds light on how the FCC should rule on Apple's alleged rejection of the Google Voice application.<sup>290</sup> Though based in part on AT&T's monopoly over the wireline network, the factors considered and principles established in *Carterfone* equally apply to a monopoly over the wireless network.<sup>291</sup> In *Carterfone*, the FCC found that a practice and tariff that prevented a third party device from connecting to the telephone network violated the Communications Act.<sup>292</sup> If a consumer wishes to "improve the utility [of the telephone system] to him . . . [he] should be able to do so, so long as the interconnection does not adversely affect the telephone company's operations or the telephone system's utility."<sup>293</sup> The FCC looked at several factors in reaching this holding: (1) the "nature and extent of the public need and demand" for the use of the *Carterfone* device;<sup>294</sup> (2) the effects the device had on the telephone system providing the message service and the public when using the device;<sup>295</sup> and (3) whether prohibition of the *Carterfone* device violated Sections 201(b) and 202(a) of the Communications Act of 1934.<sup>296</sup>

In reviewing the examiner's findings, the Commission agreed that the device filled a need and does not adversely affect the telephone system.<sup>297</sup> The FCC held that prohibiting "a customer supplied 'foreign attachment' was 'an unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental,'"<sup>298</sup> and AT&T's barring of the *Carterfone* device was "unreasonable, discriminatory, and unlawful."<sup>299</sup> Similar to the *Carterfone* device, the Google Voice application attaches to the iPhone and interfaces with AT&T's networks. Demand for this device has led at least three individuals to submit letters to the FCC protesting Apple's denial of the Google Voice application iPhone users.<sup>300</sup> A plethora of websites and bloggers have

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290. *In re Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420 (1968) [hereinafter *Carterfone*].

291. See Sandoval, *supra* note 47 at 710, n.419; see also Tim Wu, *Wireless Carterfone*, 1 INT'L J. COMM. 389, 417 (2007) available at <http://ijoc.org/ojs/index.php/ijoc/article/viewfile/152/96> (explaining why policies set forth in *Carterfone* should apply to wireless networks).

292. *Carterfone*, 13 F.C.C.2d at 423.

293. *Id.* at 424.

294. *Id.* at 421.

295. *Id.* at 421–22.

296. *Id.* at 422.

297. *Id.* at 423–24.

298. *Id.* at 423 (quoting *Hush-A-Phone Corp. v. United States*, 238 F. 2d 266, 269 (D.C. Cir. 1956)).

299. *Id.* at 423.

300. Nuyujukian, *supra* note 221; Anderson, *supra* note 223.



also posted frustrations with Apple's alleged denial.<sup>301</sup> These public statements of concern evidence the high consumer demand for Google Voice on the iPhone and public disappointment of the alleged rejection.

AT&T argued in *Carterfone* that in order to provide effective service to the public, telephone companies "must have absolute control over the quality, installation, and maintenance of all parts of the system."<sup>302</sup> Even after all these years, AT&T's argument carries the same tune: AT&T is still concerned about providing "a satisfactory experience for end-user customers."<sup>303</sup> However, neither Apple nor AT&T has produced any evidence that Google Voice creates network harm that jeopardizes a consumer's satisfactory experience. In fact, "AT&T does not disable access to or use of [the Google Voice] application" on other devices using its network.<sup>304</sup> Arguably, AT&T may not have investigated the Google Voice application at the outset of the FCC's investigation because it is "typically not consulted regarding the approval or rejection of applications for the App Store," though AT&T has consulted with Apple in the past regarding applications that might cause network harm.<sup>305</sup> However, at this juncture, AT&T has had sufficient time and notice to make such a determination. The only argument Apple advances against the Google Voice application is that it degrades the "core experience" of the iPhone by providing alternative means for placing calls and accessing contacts.<sup>306</sup>

Further, the FCC should consider whether the AT&T and Apple prohibition of the Google voice application constitutes unlawful discrimination under Section 202(a) of the Communications Act.<sup>307</sup> In *Carterfone*, the court found that AT&T discriminated against the Carterfone device by allowing a similar device run by AT&T to connect to its telephone system, essentially

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301. See, e.g., Sam Diaz, *The Google Voice app scandal: is Apple losing control over the iPhone?*, ZDNET, Aug. 24, 2009, <http://blogs.zdnet.com/BTL/?p=23096>; Saul Hansell, *Apple Denies It Rejected Google Application for iPhone*, N.Y. TIMES, Aug. 21, 2009, [http://www.nytimes.com/2009/08/22/technology/companies/22apple.html?\\_r=1](http://www.nytimes.com/2009/08/22/technology/companies/22apple.html?_r=1); Robert G. Hansen, *Google Voice, Apple and ATT*, ROBERT HANSEN'S BLOG, Aug. 21, 2009, <http://robertghansen.blogspot.com/2009/08/google-voice-apple-and-att.html>; Chris Foresman, *FCC probes Google Voice rejection, AT&T denies involvement*, ARS TECHNICA, Aug. 3, 2009, <http://arstechnica.com/apple/news/2009/08/fcc-probes-google-voice-rejection-att-denies-involvement.ars> ("Even having a seat (at least until recently) on Apple's board wasn't enough to get Google Voice approved").

302. *Carterfone*, 13 F.C.C.2d at 424.

303. AT&T Resp., *supra* note 189, at 5.

304. *Id.* at 16.

305. *Id.* at 1.

306. *Id.* at 1–2.

307. 47 U.S.C. § 202(a).

providing itself with an advantage.<sup>308</sup> The facts of the present case are similar. Here, Apple is conferring a benefit on AT&T by approving and selling the AT&T Virtual Receptionist application in the App Store while prohibiting the sale of the Google Voice application, which offers the same services. Regardless of whether this amounts to an antitrust conspiracy,<sup>309</sup> the spirit of the *Carterfone* holding prohibits this type of conduct on the basis of the public interest standard.<sup>310</sup>

Apple has monopoly power over the iPhone application aftermarket<sup>311</sup> and it has tied the iPhone and wireless service to the aftermarket applications.<sup>312</sup> The decision of whether it is desirable to store and access contacts locally on the device or remotely from a server should be left to the consumer. Apple's prohibition of the Google Voice application amounts to telling the consumer what is best, an unreasonable practice that violates Section 201(b) of the Communications Act.

## VII. CONSIDERATIONS IN LIGHT OF THE NOTICE OF PROPOSED RULE MAKING

A recent Notice of Proposed Rulemaking from the FCC invites comments on six proposed rules to handle net neutrality issues, three of which are of concern to the issue addressed in this Article.<sup>313</sup> First, in considering the proposed rules, the FCC should ensure that the provision protecting a "user's entitlement to competition among application providers" is not interpreted by firms to mean application developers.<sup>314</sup> For example, competition should not mean that developers create competition for approval to the App Store because Apple has the final say on what applications it approves. Allowing Apple to restrict this type of competition hurts the public because it results in fewer mobile device applications available to the consumer.

Second, the FCC should ensure that mobile device manufacturers and application developers are prohibited from claiming the "network management" defense because manufacturers and developers are not service providers. Apple attempts to expand the reasonable network management defense to include the users' core experience when using a device.<sup>315</sup> However, this argument has nothing to do with causing harm or degrading the overall user

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308. *Carterfone*, 13 F.C.C.2d at 423.

309. *See supra* Part V.3.

310. *See Carterfone*, 13 F.C.C.2d at 423–24.

311. *See supra* Part V.A.

312. *See supra* Part V.E.

313. *Commission Seeks Public Input On Draft Rules To Preserve The Free And Open Internet*, 74 Fed. Reg. 62638 (proposed Oct. 22, 2009) (to be codified at 47 C.F.R. pt. 8).

314. *Id.*

315. Apple Resp., *supra* note 15, at 2.

experience of the network; in fact, the successful use of the same Google Voice application on Blackberry or Android-based devices demonstrates the opposite.

Third, the FCC should encourage transparency by requiring a company to justify any limitations on products or services imposed under the guise of reasonable network management by providing the consumer notice in clear terms and conditions.<sup>316</sup> No amount of disclosure or warning is sufficient to justify anticompetitive or exclusionary limitations. Blanket statements that attempt to justify engaging in exclusionary conduct to maintain the “integrity” of its products or services will not hold up in court.<sup>317</sup> Consumers should not have to trust a service provider’s word that a limitation in place is justified. To be sure, Apple and AT&T do have an interest in preventing network congestion and upholding the integrity of their products, but this interest does not grant Apple a license to capriciously deny applications because they do not fit within Apple’s idea of a user’s core experience.

Finally, the FCC should also consider an analogy to the first-sale doctrine or exhaustion rule,<sup>318</sup> an established legal concept embraced by U.S. copyright law<sup>319</sup> and patent law.<sup>320</sup> Under the first sale doctrine, a seller may not exercise control of a product after an authorized sale to another party.<sup>321</sup> When a consumer purchases a product, the consumer also pays for the freedom to use the product in any way they see fit. A legal purchase of an iPhone includes a valid transfer of all rights of ownership of that device from Apple to the consumer. Under the first sale doctrine, this transfer should prohibit Apple from reaching beyond the sale and meddling with a purchaser’s personal decision of how she desires to use the iPhone. For example, purchase of an iPhone should include the ability to download, install, and use any application of their choosing, so long as that application does not cause network harm.<sup>322</sup> iPhone owners should even have the ability to uninstall the included operating system completely in favor of a different operating system, such as Microsoft’s Windows Mobile or Google’s Android. The first sale doctrine should also allow consumers the freedom to switch wire-

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316. 74 Fed. Reg. 62638 at E.

317. See *Microsoft*, 253 F.3d at 54; *supra* note 142.

318. Cases involving licensed products are treated differently because the consumer never acquires actual ownership. See e.g., *United States v. Wise*, 550 F.2d 1180, 1189 (9th Cir. 1977); *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 517 (9th Cir. 1993). Because Apple sells iPhones rather than merely license their use, these cases are inapplicable and will not be discussed.

319. See *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350 (1908) (codified in the Copyright Act of 1976, 17 U.S.C. § 109 (2009)).

320. See *Quanta v. LG Elec.*, 553 U.S. 617, 628 (2008) (establishing that patent enforcement is restricted following the sale of an item).

321. 17 U.S.C. § 109; *Quanta*, 553 U.S. at 628.

322. *Carterfone*, 13 F.C.C.2d at 424.

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less service providers with no penalty costs or fees because controlling the provider overreaches the original sale and unreasonably interferes with his personal decisions.

### VIII. CONCLUSION

Apple's current practices force iPhone owners that wish to use Google Voice to breach the service contract with AT&T. Currently, the only way to use the Google Voice application on an iPhone is by "jail breaking" the iPhone.<sup>323</sup> Jail breaking allows users to install applications not included in Apple's App Store.<sup>324</sup> However, jail breaking voids the user's existing service contract with AT&T. A user's preference for a mobile application is her prerogative and she should not be forced to choose between voiding the service contract or going without. Instead, Apple should make the Google Voice application available to all iPhone users through its App Store because denying its use runs afoul of Apple's goal to "provide [its] customers with the best possible user experience."<sup>325</sup>

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323. iPhoneChris, *How to Jailbreak Your iPhone in Under a Minute*, AppleiPhoneReview, Aug. 1, 2007, <http://www.appleiphonereview.com/iphone-tutorials/iphone-jailbreak/> (last visited Nov. 3, 2010).

324. *Id.*

325. Apple Resp., *supra* note 15, at 1.

